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# **Decision addressed to Royal Mail Group Limited and The Salegroup Limited (trading as despatchbay.com) by the Office of Communications**

Section 2, Competition Act 1998

Article 101, Treaty on the Functioning of the European Union

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# 1. Overview

This Decision of the Office of Communications (“Ofcom”) is addressed to:

- Royal Mail Group Limited (“Royal Mail”); and
- The Salegroup Limited (trading as despatchbay.com) (“TSG”).

In this Decision, we predominantly discuss the actions of Royal Mail’s parcel division, ParcelForce Worldwide (“PFW”). We therefore refer to PFW instead of Royal Mail throughout the document. In addition, we refer to one of PFW or TSG interchangeably as “Party” and collectively refer to them both as the “Parties”.

This Decision sets out Ofcom’s findings that the Parties have infringed the prohibition imposed by section 2(1) (the “Chapter I prohibition”) of the Competition Act 1998 (the “Act”) and Article 101 of the Treaty on the Functioning of the European Union (“TFEU”). This Decision is issued under section 31 of the Act and rule 10 of the CMA’s procedural rules.<sup>1</sup>

Specifically, Ofcom has found that between 5 August 2013 (at the latest) to 25 May 2018 (the “Relevant Period”) the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a customer allocation agreement that had the object of preventing, restricting or distorting competition in the market for the retail supply of express parcel delivery services to business customers based in the UK (the “Relevant Market”) and may have affected trade within the UK and between EU Member States (the “Infringement”).

On 19 September 2019, Ofcom announced it had settled the case with TSG after it admitted that it had infringed the Chapter I prohibition and/or Article 101 TFEU. Ofcom has imposed a financial penalty of £40,000 on TSG under section 36 of the Act in respect of the Infringement (after applying a settlement discount).

Royal Mail reported the conduct to the CMA on 24 May 2018 and the CMA issued a provisional marker on 25 May 2018.<sup>2</sup> Ofcom subsequently confirmed Royal Mail’s leniency marker on 13 July 2018. No financial penalty will be imposed on Royal Mail provided that it cooperates with Ofcom and complies with the conditions of the CMA’s leniency policy<sup>3</sup> and the terms of the leniency agreement between Ofcom and Royal Mail dated 10 September 2019 (the “Leniency Agreement”).

In accordance with the CMA Rules, this Decision states the facts upon which we rely and our reasons for making this Decision.<sup>4</sup> The rest of this document summarises Ofcom’s findings relating to the Infringement and the evidence upon which we rely.

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<sup>1</sup> The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, SI 2014/458 (the ‘CMA Rules’).

<sup>2</sup> The last contact between the Parties prior to 25 May 2018 on which Ofcom relies to reach its findings in this Decision was on 24 April 2018. There was contact between the Parties after this time. However, Ofcom has decided that this does not form part of the infringement since it post-dates the leniency application and was dealt with in accordance with the terms under which the leniency marker was granted.

## Structure of the document

- 1.1 The remainder of this document is set out as follows:
- a) **Section 2** sets out relevant background context and the key evidence on which we rely in this Decision (as supplemented by Annex 5);
  - b) **Section 3** sets out our legal assessment and our findings that the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an agreement that had the object of preventing, restricting or distorting competition in the Relevant Market; and
  - c) **Section 4** sets out Ofcom’s decision, including its decision not to impose directions on the Parties and its decision to impose a financial penalty on TSG in this case.
- 1.2 In addition, further information is included within the following annexes, which form an integral part of this Decision:
- a) **Annex 1**: sets out the glossary and defined terms;
  - b) **Annex 2**: describes the origin of this investigation and provides an overview of the investigatory steps taken to date;
  - c) **Annex 3**: sets out Ofcom’s view of the relevant market in this case;
  - a) **Annex 4**: sets out the names and roles of key employees of TSG and PFW referred to in this Decision; and
  - b) **Annex 5**: sets out a detailed summary of the relevant evidence showing the interactions between the Parties relating to individual customers, to supplement the evidence set out at Section 2.

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<sup>3</sup> See:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)

<sup>4</sup> CMA Rules, rule 10.

## 2. Background

- 2.1 This Decision sets out our conclusion that during the Relevant Period the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an agreement not to offer or supply parcel delivery services to each other's retail customers in the Relevant Market.
- 2.2 In this section, we set out relevant background context for the Parties' business activities and the sector affected by the Infringement. We also set out the key evidence on which we rely in this Decision. We have based our findings principally on contemporaneous email correspondence and evidence obtained from both PFW and TSG during Ofcom's investigation.<sup>5</sup> This section is supplemented by Annex 5, which sets out more detail on the interactions between the Parties relating to individual customers and forms an integral part of this Decision.<sup>6</sup>

### The Parties

- 2.3 This Decision is addressed to Royal Mail and TSG. We provide an overview of each of the Parties below.

#### Royal Mail

- 2.4 Royal Mail is a public limited company (company number: 08680755) listed on the London Stock Exchange. It is the holding company for an integrated postal services company operating in the UK and elsewhere. In the financial year to 2018, the last financial year to which the conduct in this Decision relates, it had group revenues of £10,172 million.<sup>7</sup>
- 2.5 Royal Mail's operations are separated into two networks:
- a) **UK Parcels, International & Letters ("UKPIL")**: operates Royal Mail's core postal services network in the UK, as well as its ParcelForce network. UKPIL has around 141,000 employees<sup>8</sup> and reported revenue of £7,615 million<sup>9</sup> in the financial year 2017-8. In the financial year to 2018 Royal Mail's core network delivered 11,269 million addressed letters, 3,109 million unaddressed letters and 1,230 million parcels.<sup>10</sup>
  - b) **General Logistics Systems ("GLS")**: operates a postal services network throughout Europe. GLS has around 18,000 employees<sup>11</sup> and reported revenue of £2,557 million<sup>12</sup> in the financial year 2017-8.

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<sup>5</sup> See Annex 2 for an overview of Ofcom's investigation.

<sup>6</sup> We explain in this section where and how we are relying on the evidence set out in Annex 5.

<sup>7</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 4.

<sup>8</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 3.

<sup>9</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 4.

<sup>10</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 22.

<sup>11</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 2.

<sup>12</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 4.

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- 2.6 Ofcom has designated Royal Mail as the universal service provider and has imposed upon it regulatory conditions requiring it to provide a universal service.<sup>13</sup> However, these conditions do not apply to PFW's express parcel delivery activities.
- 2.7 ParcelForce Worldwide ("PFW"), part of Royal Mail's UKPIL division, is a provider of express parcel delivery services. PFW operates a 'hub and spoke' collection and delivery system with two hubs based at Coventry. One hub is for UK parcels and the other for international parcels.<sup>14</sup> PFW is a trading name of Royal Mail, rather than a distinct legal entity.
- 2.8 PFW has around 4,500 employees and in the last financial year generated turnover of around £503 million,<sup>15</sup> delivering 98 million parcels.<sup>16</sup>

## TSG

- 2.9 TSG is a limited liability company (company number 03949786), incorporated in 2000 under the name Come-Shopping.Com Ltd. The company is wholly owned by Mr Andrew Bicknell, who has been the Managing Director since 2009.<sup>17</sup> Mr Bicknell is the only active corporate director listed on Companies House.<sup>18</sup>
- 2.10 TSG is a technology company<sup>19</sup> facilitating access to parcel services on the internet, commonly described as a 'third party integrator'.<sup>20</sup> DespatchBay.com ("Despatch Bay") is a trading name of TSG.
- 2.11 Despatch Bay is an online reseller<sup>21</sup> of parcel delivery services from a number of parcel operators, including ParcelForce UK, ParcelForce International, Yodel, DX Freight, DX

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<sup>13</sup> Ofcom, *Postal Regulation: Transition to the new regulatory framework*, 29 September 2011, Annex 1. This designates Royal Mail Group Limited (a wholly owned subsidiary of Royal Mail plc) as the Designated Universal Service Provider. Ofcom imposed a Designated USP condition on Royal Mail Group Limited on 27 March 2012, which has been modified on a number of occasions since. See: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0023/54761/statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0023/54761/statement.pdf).

<sup>14</sup> Royal Mail, *Description of parties and background to the parcels sector*, paragraph 1.4 (RMG0778).

<sup>15</sup> Royal Mail, *Description of parties and background to the parcels sector*, paragraph 1.5 (RMG0778).

<sup>16</sup> Royal Mail, *Annual Report and Financial Statements 2017-18*, page 22.

<sup>17</sup> TSG's response of 10 September 2018 to Question 7(a) in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0066).

<sup>18</sup> See: <https://beta.companieshouse.gov.uk/company/03949786>.

<sup>19</sup> TSG has described its business as "a technology company ... enabling seamless access to parcel services... Offering a broad set of parcel services across multiple carriers in a cutting edge web based solution. Our typical customers trade mainly online and across multiple marketplaces, such as Amazon, eBay etc. ...Despatch Bay handles all elements of the carrier relationship for our clients. We enable the client to use multiple carriers and services whilst offering a centralised, very accurate and efficient one stop shop for billing, invoicing, claims, customer services etc" (see TSG's response of 10 September 2018 to Question 1(a) of Ofcom's Section 26 Information Request dated 13 August 2018 (TSG0027)).

<sup>20</sup> A 'third-party integrator' will obtain integration details from the main parcel operators on the key features of their labels and then provide software to the e-retailers allowing them easily to print off those labels. This can be particularly helpful to an e-retailer who multi-sources services from different parcel operators. See paragraph 2.9 of Royal Mail, *Description of parties and background to the parcels sector* (RMG0778).

<sup>21</sup> See paragraph 2.19 below. Royal Mail notes: "[Despatch Bay agrees] reduced rates from a parcel operator, and then sells those services to its customers, without ever taking physical ownership of the parcel. Instead, once it has made the same, it will direct the parcel operator to where the end-customer is located and from where it needs to pick up the parcels. This is often referred to as an online reseller arrangement" (see Royal Mail, *Description of parties and background to the parcels sector*, paragraph 2.8). We also understand Despatch Bay also acts as a 'consolidator', where it collects bundles of packets/parcels from senders and sends these through Royal Mail with which it has negotiated cheaper bulk rates (see

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Secure, DHL, Whistl, and Royal Mail.<sup>22</sup> It primarily focuses on small to medium sized commercial customers, rather than consumers.<sup>23</sup> It arranges delivery of parcels via the selected courier, without coming into direct contact with the goods,<sup>24</sup> utilising web-based technologies to provide ancillary, 'value-add' services to manage and simplify the parcel despatch process for its clients.<sup>25</sup> TSG notes that: "*Despatch Bay handles all elements of the carrier relationship for our clients. We enable the client to use multiple carriers and services whilst offering a centralised, very accurate and efficient one stop shop for billing, invoicing, claims, customer services etc*".<sup>26</sup>

- 2.12 TSG sells PFW's services<sup>27</sup> to both larger customers under bulk account service contracts, as well as smaller amounts of ad-hoc sales of single-piece parcel services.<sup>28</sup>
- 2.13 TSG employs around 50 employees and in the last financial year generated turnover of around £[8<].<sup>29</sup> Despatch Bay deals with approximately 1.9 million parcels per year.<sup>30</sup>

## The business parcel delivery sector

- 2.14 In 2017-18 measured UK domestic<sup>31</sup> parcel volumes were 1.92 billion items<sup>32</sup> (accounting for 81% of total volumes)<sup>33</sup> and measured domestic revenues were over £5.9 billion<sup>34</sup> (accounting for 63% of total revenues).<sup>35</sup> Major parcel operators providing UK-wide services include PFW, The Alternative Parcels Company Limited, Amazon Logistics, DHL

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Royal Mail's response of 7 September 2018 to Question 1 of Ofcom's Information Request dated 13 August 2018 (RMG0231 and paragraph 2.19b) below).

<sup>22</sup> TSG's response of 10 September 2018 to Question 1(d) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0031).

<sup>23</sup> TSG's response of 10 September 2018 to Question 2 in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0033, TSG0034, TSG0035, TSG0038, TSG0039, TSG0040 and TSG0041).

<sup>24</sup> Despatch Bay, *Terms and Conditions of Service*, clause 2(a) and 2(b), as available at 24 January 2019 at <https://despatchbay.com/support/terms>. This excludes shipments made with Despatch Bay Packets, for which Despatch Bay will collect the client's packets before sorting them and forwarding them on to the Royal Mail delivery network (see Despatch Bay, *Terms and Conditions of Service*, clause 2.2) (TSG0171).

<sup>25</sup> TSG's response of 10 September 2018 to Question 1(a) in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027).

<sup>26</sup> TSG's response of 10 September 2018 to Question 1(a) in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027).

<sup>27</sup> Excluding PFW's 24 Large service, which is not available to resellers.

<sup>28</sup> In addition, PFW and TSG have an online trading agreement relating to the website <https://www.senditnow.com/> (see TSG's response of 10 September 2018 to Question 1(a) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027), Royal Mail's response to Question 1 of Ofcom's Information Request dated 13 August 2018 (RMG0231) and the contract between Royal Mail and TSG and dated 14 October 2014 (RMG0217). For the avoidance of doubt, neither arrangement is covered by this Decision, which focuses on TSG's activities as a reseller of parcel delivery services.

<sup>29</sup> TSG's response of 10 September 2018 to Question 1(a) in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027).

<sup>30</sup> *Ibid.*

<sup>31</sup> Where the parcel is sent and delivered in the UK.

<sup>32</sup> Ofcom's *Annual monitoring update on the postal market: Financial year 2017-18*, 27 November 2018, paragraph 4.9. This document is available at [https://www.ofcom.org.uk/data/assets/pdf\\_file/0027/128268/Annual-monitoring-update-postal-market-2017-18.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0027/128268/Annual-monitoring-update-postal-market-2017-18.pdf)

<sup>33</sup> Ofcom's *Annual monitoring update on the postal market: Financial year 2017-18*, 27 November 2018, paragraph 4.10.

<sup>34</sup> Ofcom's *Annual monitoring update on the postal market: Financial year 2017-18*, 27 November 2018, paragraph 4.9.

<sup>35</sup> Ofcom's *Annual monitoring update on the postal market: Financial year 2017-18*, 27 November 2018, paragraph 4.10.

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International (UK) Limited, DPD Group UK Limited, DX (Group) plc, FedEx UK Limited, Hermes Parcelnet Limited, TNT UK Limited, Tuffnells Parcels Express Limited, UK Mail Limited, UPS Limited and Yodel Delivery Network Limited.<sup>36</sup>

- 2.15 The UK parcels market is a growing sector, with volumes and revenues increasing year on year, largely due to growth in e-commerce activity.<sup>37</sup> It is also a competitive market, with average unit revenues for domestic parcels showing a decreasing trend.<sup>38</sup> This may reflect, at least in part, growing price competition among parcel operators.<sup>39</sup>

## The supply chain for parcel delivery services

- 2.16 Parcel delivery services involve the carriage of parcels from a pick-up address to an end address. Between these points, parcels may be grouped together before being transported through a delivery network to sorting centres and then on to local depots and delivery vans. The vast majority of parcels originate from businesses and are delivered to two broad types of recipient – businesses (B2B) and consumers (B2C).
- 2.17 The parcel delivery sector is broadly segmented into bulk and single piece services:
- a) **bulk services:** bulk services consist of parcel delivery services of multiple parcels purchased by large customers such as e-retailers through, usually annual, contracts with the parcel operator and daily collections at their premises;<sup>40</sup> and
  - b) **single piece services:** single piece services consist of smaller customers, including SMEs and consumers, purchasing parcel services on an individual basis.<sup>41</sup>
- 2.18 Parcel operators such as PFW sell their services directly to the end customer (i.e. the sender of the parcel) through face-to-face negotiations, or by encouraging customers to purchase their services from PFW's website<sup>42</sup> or at a parcel shop.

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<sup>36</sup> Ofcom's Annual monitoring update on the postal market: Financial year 2017-18, 27 November 2018, paragraph 4.3.

<sup>37</sup> Ofcom's Annual monitoring update on the postal market: Financial year 2017-18, 27 November 2018, paragraph 4.18.

<sup>38</sup> Ofcom's Annual monitoring update on the postal market: Financial year 2017-18, 27 November 2018, paragraph 4.10.

<sup>39</sup> Ofcom's Annual monitoring update on the postal market: Financial year 2016-17, 23 November 2017, paragraph 6.13.

See also Ofcom's Annual monitoring update on the postal market: Financial year 2017-18, 27 November 2018, paragraph 4.8, although we note that this report acknowledges that the decreasing unit revenues may reflect a "change in the mix of parcels being delivered by operators with an increase in the proportion of smaller, cheaper parcels, generating lower average unit revenues".

<sup>40</sup> Royal Mail, *Description of parties and background to the parcels sector*, paragraph 2.2 (RMG0778).

<sup>41</sup> *Ibid.*

<sup>42</sup> PFW sells its services online via SendItNow.com. The website was developed by and is managed by TSG. The services that TSG provides in this regard are dealt with separately from its reseller and consolidator contracts (all of which are dealt with under separate standalone contracts) (see TSG's response of 10 September 2018 to Question 1(a) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027), Royal Mail's response to Question 1 of Ofcom's Information Request dated 13 August 2018 (RMG0231) and the contract between Royal Mail and TSG dated 14 October 2014 (RMG0217). For the avoidance of doubt, neither arrangement is covered by this Decision, which focuses on TSG's activities as a reseller of parcel delivery services.



- 2.19 Alternatively, they can sell via third-party intermediaries, such as online resellers or consolidators, such as TSG.<sup>43</sup> This involves a party other than the carrier or the shipper taking a role in the fulfilment value chain. For example:
- a) **Online resellers:** Online resellers agree discounted rates with parcel operators and then onward sell the services to the end-customer. The selected parcel operator provides the underlying delivery service, and the reseller does not take physical possession of the parcel.<sup>44</sup>
  - b) **Consolidators:** A consolidator, on the other hand, collects parcels from local consumers/small businesses and then sends them under its own account with a parcel operator. It aims to negotiate lower per unit rates given its higher volumes and then “resells” those services to its customers at a higher rate.
- 2.20 The development of such third-party intermediary business models has altered traditional carrier-shipper relationships,<sup>45</sup> by introducing additional players in the value chain, which may reduce the margin available on parcel delivery services by competing at the retail level.<sup>46</sup>

## Market definition

- 2.21 While Ofcom is not obliged to define the relevant market in all cases,<sup>47</sup> it helps us to:
- a) consider the Parties’ ‘relevant turnover’ (as this is necessary for establishing a financial penalty); and
  - b) assess whether the Parties are actual or potential competitors (as discussed at paragraphs 3.23-3.31 below).<sup>48</sup>
- 2.22 For the reasons set out in Annex 3, Ofcom has found that the relevant market is **the retail supply of express parcel delivery services to business customers based in the UK** (which we refer to as the “Relevant Market”).

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<sup>43</sup> See paragraph 2.11.

<sup>44</sup> See Figure 1 in Annex 3, Market definition.

<sup>45</sup> See Royal Mail’s response to Ofcom’s *Review of the regulation of Royal Mail*, 18 September 2015, paragraph 2.39 (available at [https://www.ofcom.org.uk/data/assets/pdf\\_file/0017/72053/royal\\_mail.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0017/72053/royal_mail.pdf)) and *Appendix: Parcels market developments*, paragraphs 1.29 to 1.32 (available at [https://www.ofcom.org.uk/data/assets/pdf\\_file/0023/81581/royal\\_mail\\_parcel\\_appendix.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0023/81581/royal_mail_parcel_appendix.pdf)).

<sup>46</sup> See Royal Mail’s *Appendix: Parcels market developments*, paragraph 1.33 (available at [https://www.ofcom.org.uk/data/assets/pdf\\_file/0023/81581/royal\\_mail\\_parcel\\_appendix.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0023/81581/royal_mail_parcel_appendix.pdf)).

<sup>47</sup> See paragraphs A3.1 and A3.2 below.

<sup>48</sup> PFW sells directly to end-customers via its website <https://www.senditnow.com/>. This website is managed by TSG. See footnote 1 in Royal Mail’s *Description of parties and background to the parcels sector* (RMG0778).

## Relevant facts

- 2.23 We describe below the evidence that we rely upon to reach our decision that the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by agreeing to allocate customers in the Relevant Market.
- 2.24 Based upon the evidence (as set out in this section and in Annex 5), we make the following key factual findings:
- a) there was an understanding between the Parties that they would not offer or supply parcel delivery services to each other's customers on both an active and passive basis<sup>49</sup> (the "Customer Restriction");
  - b) the Parties actively monitored and enforced the Customer Restriction during the Relevant Period; and
  - c) the Customer Restriction was formally terminated on 17 August 2018.
- 2.25 We refer to various employees of PFW and TSG in the remainder of this document. See Annex 4 for an overview of the key relevant individuals and their job titles.

## The Parties' commercial arrangements and the Customer Restriction

- 2.26 The evidence demonstrates that the Parties entered into a contractual arrangement in 2011, whereby they agreed that PFW would provide parcel delivery services to TSG for onward resale to TSG's end-customers.<sup>50</sup>
- 2.27 During at least March to October 2011, PFW and TSG negotiated contractual terms for the provision of PFW's parcel delivery services to TSG's end-customers<sup>51</sup> and shared various iterations of a written contract. The evidence shows that PFW emailed TSG at least two versions of a draft written contract in September 2011, entitled "*Parcelforce Worldwide Corporate Services Agreement*" between "*ROYAL MAIL GROUP LIMITED (trading as Parcelforce Worldwide)*" and "*Come Shopping.com Ltd*<sup>52</sup> t/a *Despatch Bay*".<sup>53</sup> We refer to

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<sup>49</sup> In this context, 'active' sales mean actively approaching individual customers by, for instance, direct mail, including the sending of unsolicited e-mails, or visits; whereas 'passive' sales means responding to unsolicited requests from individual customers, including delivery of goods or services to such customers, in line with the definition in the European Commission's *Guidelines on Vertical Restraints* (SEC (2010) 411), paragraph 51.

<sup>50</sup> See: (1) Email dated 17 June 2011 (17:18) from [Individual TSG2] (TSG) to [Individual PFW4] (PFW) (TSG0100); and (2) Email dated 1 July 2011 (09:53) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) (TSG0101).

<sup>51</sup> See: (1) Email dated 22 March 2011 (11:59) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) (TSG0096); (2) Email dated 17 June 2011 (17:18) from [Individual TSG2] (TSG) to [Individual PFW4] (PFW) (TSG0100); (3) Email dated 1 July 2011 (09:53) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) (TSG0101); (4) email discussions contained in TSG0103, TSG0106, TSG0107, TSG0108, TSG0113, TSG0114, TSG0115, TSG0116, TSG0117 and TSG0118 and (5) TSG's response of 10 September 2018 to Question 2 in Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0033, TSG0034, TSG0035, TSG1017, TSG0039, TSG0040 and TSG0041).

<sup>52</sup> Come Shopping.com Ltd changed its name to The Salegroup Limited ('TSG') in 2012. The company name change resolution dated 10 May 2012 was filed at Companies House on 6 June 2012.

<sup>53</sup> See: (1) email dated 15 September 2011 (17:19) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) and [Individual TSG8] (TSG) (TSG0122 which attached document TSG0063 and (2) email dated 21 September 2011 (15:41) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) (TSG0094 which attached document TSG0064/RMG0001)).

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what appears to be the latest available draft of the contract, sent from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) on 21 September 2011, as the “Services Agreement” in this Decision.<sup>54</sup>

- 2.28 While the Parties traded with each other from 2011 onwards, it appears no formal contract was signed and/or formally entered by the Parties.<sup>55</sup>
- 2.29 Contemporaneous documentary evidence demonstrates that, from at least 5 August 2013 to 25 May 2018, the Parties implemented, operated and enforced a general restriction that prohibited the Parties from offering and supplying parcel delivery services to each other’s customers at the retail level, on both an active and passive basis. The contemporaneous evidence is unclear as to which of the Parties instigated this restriction and we consider that this restriction evolved separately to the Parties’ 2011 commercial arrangement outlined above.
- 2.30 We refer to this prohibition in this Decision as the “Customer Restriction”.
- 2.31 We set out below, and at Annex 5, the evidence which demonstrates that both Parties, during the Relevant Period:
- a) understood and were aware of the Customer Restriction;
  - b) actively monitored the application of the Customer Restriction; and
  - c) consistently took steps to enforce the Customer Restriction.
- 2.32 While we summarise key evidence in this section, the full suite of evidence showing interactions between the Parties relating to individual customers that we have identified is set out at Annex 5. Our findings are based on the evidence set out in this Decision. Where we rely on evidence from Annex 5, this is indicated below.

### The Parties’ understanding of the Customer Restriction

- 2.33 Contemporaneous documentary evidence shows that each Party was aware of a general understanding and/or rule existing between the Parties that prohibited one Party from offering or supplying parcel delivery services to an existing customer of the other Party, i.e. the Customer Restriction.
- 2.34 PFW’s understanding of the operation and parameters of the Customer Restriction is demonstrated by contemporaneous emails, which show that the fundamental principle of

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<sup>54</sup> Email dated 21 September 2011 (15:41) from [Individual PFW4] (PFW) to [Individual TSG2] (TSG) (TSG0094 which attached document TSG0064/RMG0001)).

<sup>55</sup> See, for example: (1) internal PFW Powerpoint presentation from December 2015, entitled “TSG contract, A plan to reach a new agreement”, which noted that “There is no signed agreement in place between us” (RMG0640) (attached to email dated 16 December 2015 (12:59) from [Individual PFW8] (PFW) to [Individual PFW2] (PFW) (RMG0639)); (2) TSG’s response of 10 September 2018 to Question 6(a) of Ofcom’s 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0061).

not offering or suppling each other's customers was understood within PFW. For example:<sup>56</sup>

- a) An internal PFW email from [Individual PFW6] (PFW) to various PFW employees on 3 October 2013 noted: "Please ensure all the teams understand – do not deal with sale group – despatch bay customers – even if the [sic] approach directly - we have a joint no poach agreement! which is firmly in place".<sup>57</sup>
- b) A further internal PFW email from [Individual PFW10] (PFW) to [Individual PFW11] (PFW) on 23 May 2014 notes that: "DB [Despatch Bay] have complained that we have entered into dialogue with one of their customers, which is exactly what we have done. The agreement is that either party, PFW or DB [Despatch Bay], will walk away if the other party is already dealing...Ideally the sales exec should have established who the shipper was using and declined to give any further information as they are already a customer of PFW via DB [Despatch Bay]. In my experience DB [Despatch Bay] will ALWAYS walk away".<sup>58</sup>
- c) In an internal PFW email chain in June 2015 discussing a potential approach to a TSG customer, [Individual PFW2] (PFW) notes a "*long established rule [...] that we leave their customers alone and they leave ours alone*".<sup>59</sup> He then confirmed that the "*rule was in place with Corporate and reconfirmed recently with [Individual PFW6]. We should not quote if someone is using Despatch Bay and, if it turns out they do but didn't tell us, we walk away. DB [Despatch Bay] will walk away if someone says they use PFW.*"<sup>60</sup>
- d) On 17 September 2015, [Individual PFW2] (PFW) sent draft notes from a meeting on 15 September 2015 to [Individual PFW6] (PFW) to "*clarify our position*" that stated: "*Sales conflicts: I can confirm that our sales team have been briefed not to approach or to politely stop any ongoing approaches to customers if they become aware that the customer is using TSG. There may be occasions where, for innocent or customer-driven reasons we find out team talking to one of your customers. We will do the best we can to maintain a consistent approach but should we need to make a decision based on what we believe is the customer's ultimate need then our decision will stand. Again this is consistent with how we work with all reselling customers.*"<sup>61</sup>
- e) An internal PFW Powerpoint presentation dated December 2015 and entitled "*TSG contract, A plan to reach a new agreement*", sets out the 'agreement' as:

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<sup>56</sup> See also the following example in Annex 5: (i) [Customer 30] where [Individual PFW6] (PFW) notes: "*if they have an account with Despatch bay we shouldn't be taking the traffic. We have a reciprocal arrangement not to poach traffic*" (Email dated 16 March 2015 (16:43) from [Individual PFW6] (PFW) to [Individual PFW26] and others (PFW) (RMG0499)). See also examples related to [Customer 67], [Customer 77], [Customer 62] and [Customer 19] in Annex 5.

<sup>57</sup> Email dated 3 October 2013 (15:36) from [Individual PFW6] (PFW) to various PFW employees (RMG0299).

<sup>58</sup> Email dated 23 May 2014 (06:20) from [Individual PFW10] (PFW) to [Individual PFW11] (PFW) (RMG0412).

<sup>59</sup> Email dated 26 June 2015 (11:17) from [Individual PFW2] (PFW) to [Individual PFW11] (PFW) (RMG0648).

<sup>60</sup> Email dated 26 June 2015 (11:50) from [Individual PFW2] (PFW) to [Individual PFW11] (PFW) (RMG0648)

<sup>61</sup> Email dated 17 September 2015 (14:23) from [Individual PFW2] (PFW) to [Individual PFW6] (PFW) (RMG0611).

“Non-compete (TSG will not sell to a PFW contract customer, PFW will not sell to a TSG customer)

- *This stops TSG selling Yodel to a PFW customer BUT it prevents PFW selling against Yodel if the customer uses Yodel via TSG – very difficult to manage as we do not know who their Yodel customers are, quite often when there is conflict they say they are a Yodel customer and we are required to back off.*
- *There is no agreed ‘cooling off period’ or agreed customer wording in the event of a conflict*
- *There are example customers where PFW contracts direct for International while TSG contracts (PFW) for UK*
- *There are also examples where we reject the customer due to traffic only to have them sign them up against a different profile.*
- *There are also examples where they have won customers from us on price and we have backed out due to customer pressure.”<sup>62</sup>*

f) In February 2017 [Individual PFW6] (PFW) forwarded internal sales guidance for “Strategic, Field, Indirect or Telesales” teams to [Individual PFW11] (PFW).<sup>63</sup> This guidance explicitly stated that: *“There is an agreement in place that we do not sell to customers who use The Sale Group / Despatch bay. Approaches should be emailed to the indirect team.”*<sup>64</sup> While we do not have contemporaneous email evidence of this being shared with PFW’s sales teams, we have concluded that it was applicable as at 15 February 2017 as [Individual PFW6] (PFW) referred to it as *“the current guidelines for the sales channels”*.<sup>65</sup>

g) In January 2018, [Individual PFW8] (PFW) emailed [Individual PFW20] (PFW) and explained his understanding of the agreement between PFW and TSG as follows:

*“The agreement as I have been told verbally as it has never been written down I believe is; [sic]*

*PFW will back away from any customer they approach that informs them that they use The Sale Group, whether that is using PFW or any other The Sale Group carrier.*

*TSG will back away from any customer who has an account with PFW that is live.*

*There is no allowance to offer one of their alternative carriers.*

*Percentage of purse has never been a consideration in the above.*

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<sup>62</sup> PFW document, *TSG Contract, A plan to reach a new agreement*, slide 5 (RMG0640) (attached to email dated 16 December 2015 (12:59) from [Individual PFW8] (PFW) to [Individual PFW2] (PFW) (RMG0639).

<sup>63</sup> Email dated 15 February 2017 (14:21) from [Individual PFW6] (PFW) to [Individual PFW11] (PFW) (RMG0724).

<sup>64</sup> PFW document, *Strategic, Field, Indirect or Telesales* (RMG0690).

<sup>65</sup> Email dated 15 February 2017 (14:21) from [Individual PFW6] (PFW) to [Individual PFW11] (PFW) (RMG0724).

*The only variation that has ever come from this is if there is a clear demarcation of traffic ie if we only do a customer's UK traffic, they can go after the International traffic and the same applies in return".<sup>66</sup>*

2.35 Similarly, contemporaneous documentary evidence also demonstrates TSG's understanding of the operation and parameters of the Customer Restriction. For example:

- a) a record of prospective customer contacts in 2016 records at least 66 instances where TSG informed prospective customers they could not offer or supply parcel delivery services to them after finding out that the customer already obtained services directly from PFW, due to its "partnership" with PFW.<sup>67</sup> For example:
  - i) an entry in relation to [Customer 92] notes that *"He told me they use Parcelforce and get contract rates and daily collections. I advised that I cannot take the call any further due to being in partnership with them"*;<sup>68</sup>
  - ii) an entry in relation to [Customer 93] states that the customer *"said they are in a direct contract with parcelforce [sic] so i [sic] explained that we can not [sic] approach their customers as we work with parcelforce [sic]"*;<sup>69</sup>
  - iii) an entry in relation to [Customer 94] notes that *"he said he is in a direct contract with Parcelforce - explained that I cannot quote him due to the agreement we have"*;<sup>70</sup>
  - iv) an entry in relation to [Customer 95] states *"... as we are currently working directly with Parcelforce, we are unable to approach and quote their customers as they are the same with us"*;<sup>71</sup>
- b) an email dated 25 November 2016 from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) regarding a "potential conflict" to note *"Whenever we know someone is talking to PFW about joining we pull out of the deal, so I would expect the same from your end in the interest of partnership"*;<sup>72</sup> and
- c) an email dated 20 June 2017 from [Individual TSG4] (TSG) to [Individual PFW8] (PFW) that stated, in relation to PFW approaching an existing TSG customer: *"Can you make*

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<sup>66</sup> Email dated 19 January 2018 (16:07) from [Individual PFW8] (PFW) to [Individual PFW20] (PFW) (RMG0714).

<sup>67</sup> Document entitled "prospect-contacts-18-03-2016.csv" (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229). See, in particular, entries on the following Excel rows: 2,623; 2,711; 2,836; 2,866; 3,085; 3,251; 3,275; 3,293; 3,297; 3,306; 3,575; 3,576; 3,588; 3,593; 3,638; 3,814; 3,817; 3,869; 4,059; 4,156; 4,171; 4,368; 4,461; 4,497; 4,519; 4,870; 4,889; 4,919; 5,177; 5,191; 5,192; 5,239; 5,294; 5352; 5,372; 5,555; 5,592; 5,716; 5,731; 5,786; 9,438; 10,509; 10,580; 12111; 12333; 12352; 12546; 12,899; 12,934; 14,813; 14,830; 14,833; 14,855; 14,901; 14,912; 14,930; 14,933; 15,030; 15,058; 15067; 15,834; 16,048; 16,061; 16,070; 16,114; 16,195.

<sup>68</sup> Document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), row 2,836.

<sup>69</sup> Document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), row 12,899.

<sup>70</sup> Document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), row 14,813.

<sup>71</sup> Document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), row 14,933.

<sup>72</sup> Email dated 25 November 2016 (13:47) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0687).

*sure, as an existing customer of ours, that he doesn't start with you please", and a further email from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) dated 21 June 2017, in relation to the same customer: "In line with our relationship can you please confirm that you will be withdrawing your quote to this customer".<sup>73</sup>*

2.36 Given the above, and in light of the evidence set out below and at Annex 5, we have concluded that both Parties understood and were aware of the Customer Restriction.

## Monitoring the Customer Restriction

2.37 The evidence demonstrates that both Parties actively monitored the application of the Customer Restriction during the Relevant Period. The Parties undertook a range of monitoring activities, including:

- a) regular email correspondence between the Parties regarding the Customer Restriction; and
- b) discussing the scope and application of the Customer Restriction in bilateral meetings.

### Email correspondence

2.38 The available evidence demonstrates that the Parties regularly used email correspondence to monitor compliance with the Customer Restriction.

2.39 First, we have observed several instances of TSG monitoring its own compliance with the Customer Restriction by emailing PFW to check whether a prospective customer was already being provided parcel delivery services by PFW directly. For example:<sup>74</sup>

- a) on 1 August 2016, [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW) to note that a prospective customer had *"mentioned they used PFW"* and asked PFW to *"see if they are telling us the truth before we proceed any further"*;<sup>75</sup> and
- b) on 23 April 2018, [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW), with an email titled *"Potential Client Clash"*, asking: *"Can you have a look to see if the following client is trading with you: [Customer 89]"*.<sup>76</sup>

2.40 Second, both Parties regularly contacted each other when one Party had identified that the other Party had potentially approached and/or provided a quote to one of its existing customers, generally to query or dispute why this had occurred. We set out several examples of such email correspondence below:<sup>77</sup>

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<sup>73</sup> Email dated 20 June 2017 (16:56) from [Individual TSG4] (TSG) to [Individual PFW8] (PFW) (RMG0704/TSG0162).

<sup>74</sup> See also examples relating to [Customer 54], [Customer 71], [Customer 13], [Customer 11] and [Customer 78] in Annex 5.

<sup>75</sup> Email dated 1 August 2016 (15:40) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0121/TSG0154).

<sup>76</sup> Email dated 23 April 2018 (14:04) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0107).

<sup>77</sup> See also the examples related to [Customer 9], [Customer 12], [Customer 23], [Customer 24], [Customer 27], [Customer 54], [Customer 56], [Customer 63], [Customer 32], [Customer 70], [Customer 31], [Customer 79], [Customer 80], [Customer 81], [Customer 83], [Customer 44], [Customer 46], [Customer 74], [Customer 59], [Customer 57], [Customer 50], [Customer 37], [Customer 36], [Customer 33], [Customer 29], [Customer 35], [Customer 48] and [Customer 68] in Annex 5.

- a) On 17 March 2014, [Individual PFW10] (PFW) emailed [Individual TSG3] (TSG) to query: *"I understand from one of our field sales execs that [redacted] at DB [Despatch Bay] has quoted the above company despite being told that they have already signed with us [PFW] direct... Please investigate and advise."*<sup>78</sup>
- b) On 28 July 2014, [Individual TSG7] (TSG) emailed [Individual PFW7] (PFW) to highlight: *"We have been told by this customer that he has just opened a direct account with yourselves but they have been one of our customers since 29/01/2013. Can you please have a look into this for us please."*<sup>79</sup>
- c) On 5 January 2015, [Individual PFW10] (PFW) emailed [Individual TSG3] (TSG) to state: *"I've had a complaint from telesales, apparently DB [Despatch Bay] have approached an existing direct customer [Customer 26], based in Manchester, who have been trading since 2012 and undercut our existing rates – kindly investigate and advise."*<sup>80</sup>
- d) On 7 June 2016, in response to a request to set up PFW parcel collections for [Customer 65], [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG) to notify him that the *"customer is a direct trading customer of Parcelforce"* and to ask TSG to *"please withdraw your quote and investigate how this came about."*<sup>81</sup>
- e) On 14 June 2016, [Individual TSG3] (TSG) asked [Individual PFW2] (PFW) for advice on how to respond to a customer who was *"not happy and does not understand why we have had to pull out"*.<sup>82</sup> [Individual PFW2] (PFW) replied on the same day to advise how TSG should respond to the customer:
- "This should be clear cut and TSG should support our positioning here:*
- They are in an active trading relationship with PFW. PFW and TSG have a strategic relationship and in the interests of that relationship TSG choose to withdraw and not quote against PFW. They are not withdrawing because we've told them to or because we are being awkward.*
- TSG would, with the customer's consent, make PFW aware of the opportunity for additional work and then PFW would progress this under our existing relationship with the customer.*
- This is what we would also choose to do if the boot was on the other foot."*<sup>83</sup>
- f) On 17 January 2018, [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG) in relation to a customer called [Customer 82], to which TSG proposed to offer services for the traffic currently put through UK Mail, to ask *"How does this work with regards to our understanding? This customer is an established PFW account holder, you have*

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<sup>78</sup> Email dated 17 March 2014 (11:15) from [Individual PFW10] (PFW) to [Individual TSG3] (TSG) (RMG0356/TSG0167).

<sup>79</sup> Email dated 28 July 2014 (15:27) from [Individual TSG7] (TSG) to [Individual PFW7] (PFW) (RMG0422).

<sup>80</sup> Email dated 5 January 2015 (13:38) from [Individual PFW10] (PFW) to [Individual TSG3] (TSG) (RMG0468).

<sup>81</sup> Email dated 7 June 2016 (14:01) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0050).

<sup>82</sup> Email dated 14 June 2016 (08:30) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) and [Individual PFW2] (PFW) (RMG0054).

<sup>83</sup> Email dated 14 June 2016 (09:55) from [Individual PFW2] (PFW) to [Individual TSG3] (TSG) (RMG0054).



*now won traffic which is apparently from UK mail [sic]. Once I agree to set this scheduled collection up I imagine any PFW parcels they post will be via you as you must have undercut their account PFW prices to get this traffic. The PFW sales person will then see their account and revenue migrate to you and will obviously view this as directly competing with us.”*<sup>84</sup> [Individual TSG3] responded on the same day to confirm he would investigate, noting *“I hear what you’re saying and it’s a valid point”*.<sup>85</sup>

2.41 We also set out further details of relevant email correspondence below from paragraph 2.47 onwards where we outline the Parties’ enforcement of the Customer Restriction.

### Evidence from meetings

2.42 Contemporaneous documents demonstrate that the Parties monitored the operation of the Customer Restriction during their bilateral meetings. For example:

- a) The minutes from a meeting on 25 June 2015 noted: *“[Individual TSG3] stated PFW has signed up one of their [TSG’s] customers with first collection yesterday... [Individual TSG3] also states that in the past PFW have backed out by putting the prices up...”*.<sup>86</sup>
- b) Furthermore, TSG also sent PFW minutes and action points from a *“Parcelforce Monthly Review”* meeting on 28 September 2015.<sup>87</sup> This stated: *“reassurances required that PF[W] will not discuss or set up our customers/ex customers required in writing by [X]”*.<sup>88</sup>
- c) On 30 September 2015, [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG) to state: *“As discussed at the meeting on Monday I am told that one of your sales guys has been in touch with the following direct PFW customer [Customer 49]... Can you please investigate and let me know”*.<sup>89</sup>
- d) On 16 November 2016, [Individual TSG3] (TSG) sent [Individual PFW8] (PFW) and [Individual PFW2] (PFW) meeting minutes which noted: *“Investigate why [Customer 16] receive a phone call from PFW direct offering their services... Need reassurances that none of our other clients are being approached in this way”*.<sup>90</sup> The same quote is included in the meeting minutes from 13 December 2016.<sup>91</sup>
- e) TSG’s meeting minutes from 20 September 2017 further state that *“[X]”* (which we assume to refer to [Individual PFW8] (PFW)), was to *“feedback to PFW salesforce that*

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<sup>84</sup> Email dated 17 January 2018 (12:29) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0082).

<sup>85</sup> Email dated 17 January 2018 (12:45) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0082).

<sup>86</sup> Email dated 26 June 2015 (16:33) from [Individual PFW8] (PFW) to [Individual TSG2] (TSG) and [Individual TSG3] (TSG) (RMG0006).

<sup>87</sup> Email dated 28 September 2015 (14:42) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) and [Individual PFW2] (PFW) (RMG0018).

<sup>88</sup> TSG, *Parcelforce Monthly Review- Minutes & Actions*, dated 28 September 2015 (RMG0019).

<sup>89</sup> Email dated 30 September 2015 (10:24) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0617).

<sup>90</sup> PFW, *Minutes & Actions PFW, Wednesday 16<sup>th</sup> November 2016 – Conference Call* (RMG0058).

<sup>91</sup> PFW, *Minutes & Actions PFW, Wednesday 13<sup>th</sup> December 2016* (RMG0060).

*all other [Customer 78] locations are off limit for approach and confirm back to TSG once instruction given".<sup>92</sup>*

- 2.43 The combination of evidence from various meetings from 2015 onwards demonstrates that the Parties discussed the Customer Restriction during their bilateral meetings and that both PFW and TSG used this as a mechanism to monitor compliance with the Customer Restriction.

### Sharing TSG's customer lists

- 2.44 We have observed various references in the evidence to the sharing of customer lists between the Parties. For example:
- a) On 5 March 2014, [Individual PFW10] (PFW) emailed [Individual TSG5] (TSG) to ask for a *"a listing of all companies utilising The Sale Group contract, ideally to be updated on a regular basis"*.<sup>93</sup> [Individual TSG5] (TSG) responded in agreement, although there is no evidence that the customer list was exchanged.<sup>94</sup>
  - b) The notes from a meeting between the Parties on 25 June 2015 set out some follow-up action points, including the Parties providing each other with customer lists, as follows: *"5. DB to provide list of customers they consider to be scheduled regular collections. PFW to compare with PFW scheduled listing... 7. DB scheduled/regular collection client list to be provided to PFW for PFW to load to our sales CRM to mitigate sales conflict."*<sup>95</sup> The meeting participants from PFW were [Individual PFW8] (PFW) and [Individual PFW2] (PFW), who worked in sales roles at that time. The meeting participants from TSG were [Individual TSG2] (TSG) and [Individual TSG3] (TSG).
  - c) On 26 June 2015, [Individual PFW2] (PFW), an attendee at the meeting with TSG on 25 June 2015, sent two emails to his colleagues:
    - i) In the first email, he shared meeting minutes from the meeting with TSG with [Individual PFW18] (PFW) and [Individual PFW6] (PFW), noting: *"PFW has signed up one of their [TSG] customers with first collection yesterday (great). [Individual PFW8] has spoken to [Individual PFW17] who's not happy but this is the rule that says we can't take their Yodal [sic] customers and they can't sell Yodel to our customers. I've asked for a list of customers that we can load to CRM and they seemed to like that idea. We'll see if they follow up on that..."*<sup>96</sup>
    - ii) Shortly afterwards, he emailed [Individual PFW11] (PFW) and [Individual PFW6] (PFW) in reference to the Customer Restriction, noting: *"The main area of conflict that we see occasional examples of is where we sell PFW against Yodel only to find*

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<sup>92</sup> TSG, *Parcelforce Monthly Review- Minutes & Actions*, dated 20 September 2017 (RMG0122).

<sup>93</sup> Email dated 5 March 2014 (11:02) from [Individual PFW10] (PFW) to [Individual TSG5] (TSG) (RMG0337).

<sup>94</sup> Email dated 6 March 2014 (10:13) from [Individual TSG5] (TSG) to [Individual PFW10] (PFW) (RMG0337).

<sup>95</sup> Email dated 26 June 2015 (16:33) from [Individual PFW8] (PFW) to [Individual TSG2] (TSG) and [Individual TSG3] (TSG) (RMG0228).

<sup>96</sup> Email dated 26 June 2015 (10:49) from [Individual PFW2] (PFW) to [Individual PFW18] (PFW) and [Individual PFW6] (PFW) (RMG0221).

*(if we weren't aware) that they use Yodel via DB. The long established rule is that we leave their customers alone and they leave ours alone. This protects them of course but also stops them selling Yodel against us. .... We have suggested to them that they provide us with a list of their customers so we can mitigate this issue. We'll see if that materialises."*<sup>97</sup>

d) [Individual TSG3] (TSG) subsequently emailed PFW a spreadsheet of its scheduled PFW customers on 17 July 2015.<sup>98</sup>

2.45 The Parties have stated that customer lists have only ever been shared between the Parties for operational purposes.<sup>99</sup>

2.46 However, we note that the two internal PFW emails sent on 26 June 2015, the day after the meeting between the Parties, are inconsistent with that rationale and indicate that the purpose of requesting a customer list from TSG the previous day was understood by [Individual PFW2] (PFW), at least in part, to be to enable the Parties to monitor the Customer Restriction. It is not clear from the evidence what the motives of TSG were in sharing the list and whether the list shared by TSG on 17 July 2015 was subsequently used by the Parties in this way.

## Enforcing the Customer Restriction

2.47 This section describes how the Parties enforced the Customer Restriction during the Relevant Period. We have identified that the Parties discussed and/or enforced the Customer Restriction in relation to at least 90 separate customers during the Relevant Period, as set out in Annex 5.

2.48 We consider that the available evidence demonstrates that both Parties consistently took steps to enforce the Customer Restriction during the Relevant Period. This meant that that each of the Parties was, from time to time, prevented from offering parcel delivery services to prospective customers.

2.49 We describe below the two key scenarios where we have observed the Parties discussing and/or enforcing the Customer Restriction, which are:

- a) **where TSG's existing customer was provided a quotation for direct parcel delivery services from PFW; and**
- b) **where PFW's existing direct customer was provided a quotation for PFW parcel delivery services on a reseller basis from TSG.**

2.50 We then outline the evidence relating to the scope of Customer Restriction and note the scenarios where it was not consistently applied.

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<sup>97</sup> Email dated 26 June 2015 (11:17) from [Individual PFW2] (PFW) to [Individual PFW11] (PFW) and [Individual PFW6] (PFW) (RMG0571).

<sup>98</sup> Email dated 17 July 2015 (12:49) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) dated 17 July 2015 (RMG0600), which attached TSG's list of scheduled PFW customers (RMG0601).

<sup>99</sup> See: (1) Letter from Addleshaw Goddard to Ofcom dated 26 September 2019 (RMG0914), and (2) TSG's 25 September 2019 response to Question 10(c) of Ofcom's S.26 Notice dated 13 August 2018 (TSG0092).

### Examples where TSG's existing customer was provided a quote for direct parcel delivery services from PFW

- 2.51 The evidence demonstrates that the Customer Restriction was regularly enforced by the Parties from time to time during the Relevant Period in circumstances where an existing TSG customer was provided a quotation for direct parcel delivery services from PFW. By enforcing the Customer Restriction, PFW was often forced to 'withdraw' its quotations and prevented from offering direct parcel delivery services to prospective customers.
- 2.52 This type of scenario came about in two principal ways, either through:
- a) **active sales:** where PFW approached an existing TSG customer; or
  - b) **passive sales:** where an existing TSG customer approached PFW to seek the direct provision of PFW parcel delivery services.

#### Active sales

- 2.53 We have observed instances of the Customer Restriction being enforced where PFW had approached and/or offered to provide direct parcel delivery services to an existing TSG customer.
- 2.54 The evidence demonstrates that, where TSG became aware of a customer approach by PFW, it took proactive steps to ensure the Customer Restriction was enforced so that the customer was not able to purchase parcel delivery services from PFW directly. This was generally by TSG contacting PFW to query why its customer had been approached and asking it to investigate further and/or withdraw from negotiations with the customer. We provide two examples below.<sup>100</sup>
- a) On 18 September 2013, [Individual TSG5] (TSG) contacted [Individual PFW10] (PFW) and [Individual PFW7] (PFW), to query why TSG's existing customer, [Customer 2], had been approached by PFW. She noted that *"they have been a customer of ours since April this year and were using Parcelforce through us"* and *"They have now informed us that they were approached by yourselves in July and opened a direct account"*.<sup>101</sup> [Individual PFW10] (PFW) subsequently referred the issue to [Individual PFW5] (PFW) and confirmed that: *"If a DB [Despatch Bay] customer approaches us for a direct quote then we need to establish if PFW are actually collecting. If the company in question are already shipping with us, then we should politely decline to quote"*.<sup>102</sup> Following this internal PFW discussion, [Individual PFW10] (PFW) responded to TSG to confirm that PFW's sales team was *"going to re-contact the above customer and 'walk away'"*.<sup>103</sup>

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<sup>100</sup> See also examples relating to [Customer 18], [Customer 41], [Customer 35], [Customer 37] and [Customer 50] in Annex 5. See also example relating to [Customer 78] (albeit, in this example, PFW eventually decided not to enforce the Customer Restriction).

<sup>101</sup> Email dated 11 September 2013 (09:13) from [Individual TSG5] (TSG) to [Individual PFW7] (PFW) and [Individual PFW10] (PFW) (RMG0261).

<sup>102</sup> Email dated 19 September 2013 (12:26) from [Individual PFW10] (PFW) to [Individual PFW5] (PFW) (RMG0265).

<sup>103</sup> Email dated 19 September 2013 (12:35) from [Individual PFW10] (PFW) to [Individual TSG5] (TSG) and [Individual PFW7] (PFW) (RMG0266).

b) On 29 May 2015, [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW) regarding one of its customers, [Customer 36], who had received a quotation for direct parcel delivery services from PFW. He requested that PFW *“please arrange to pull out so we can win these [Customer 36] back”*. He further noted: *“It’s more disappointing to see that it’s not even our customers going to market, they are being approached directly”*.<sup>104</sup> On 4 June 2015, [Individual PFW8] (PFW) responded to confirm that he was *“in the process of discussing with sales their need to exit this contract”*.<sup>105</sup>

2.55 Internal PFW correspondence demonstrates that there were also instances where PFW sought to enforce the Customer Restriction internally without being prompted or challenged by TSG. For instance,<sup>106</sup> an internal PFW email from [Individual PFW2] (PFW) to [Individual PFW14] (PFW) noted that he had *“been reviewing a few Despatch Bay clients and [Customer 47]... had popped up”* and that he could see that PFW had provided a quote to [Customer 47], which *“may be worth a second thought”*.<sup>107</sup> On 4 September 2015, [Individual PFW14] (PFW) responded to confirm that [Customer 47] had not informed him that *“they were using Despatch Bay”* and he would *“not progress the quotation any further”* within PFW.<sup>108</sup>

#### *Passive sales*

2.56 The evidence shows that the Customer Restriction was also enforced in circumstances where one of TSG’s existing customers approached PFW seeking direct PFW parcel delivery services (as opposed to continuing to obtain PFW’s services on a reseller basis via TSG). In these types of scenarios, we have observed that both Parties were active in enforcing the Customer Restriction, such that PFW may have been prevented from offering (or continuing to provide) its services directly to existing TSG customers. For example:<sup>109</sup>

- a) TSG became aware that one of its existing customers, [Customer 72], had started using PFW services directly. [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW) on 18 August 2016 to highlight that [Customer 72] *“have been a customer of ours since April 2013”*.<sup>110</sup> On 19 August 2016, [Individual TSG3] (TSG) then asked *“...will you [PFW] be pulling out?”*<sup>111</sup>
- b) On 19 May 2016, [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW) to highlight: *“We recently increased a clients [sic] rates due to them sending just 38 parcels on average a month [sic] This made them contact your sales team direct and offer rates that are ridiculously low for these volumes.”*<sup>112</sup> [Individual TSG3] (TSG) subsequently

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<sup>104</sup> Email dated 29 May 2015 (11:26) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0553).

<sup>105</sup> Email dated 4 June 2015 (16:44) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0533).

<sup>106</sup> See also examples related to [Customer 53], [Customer 61], [Customer 62], [Customer 86] and [Customer 87] in Annex 5.

<sup>107</sup> Email dated 3 September 2015 (18:10) from [Individual PFW2] (PFW) to [Individual PFW14] (PFW) (RMG0015).

<sup>108</sup> Email dated 4 September 2015 (09:54) from [Individual PFW14] (PFW) to [Individual PFW2] (PFW) (RMG0015).

<sup>109</sup> See also examples related to [Customer 25], [Customer 1] and [Customer 48] in Annex 5.

<sup>110</sup> Email dated 18 August 2016 (15:49) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0681).

<sup>111</sup> Email dated 19 August 2016 (11:34) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0681).

<sup>112</sup> Email dated 19 May 2016 (14:08) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0657).

## Decision

sent a chasing email on 20 May 2016 asking PFW to “confirm when you have pulled away from them”.<sup>113</sup> On 22 May 2016, [Individual PFW8] (PFW) responded to confirm: “Once the sales colleague comes back to me I will instruct them to withdraw the quote”.<sup>114</sup>

2.57 We have also observed instances of PFW taking steps to enforce the Customer Restriction without intervention from TSG, to ensure that it did not provide a quotation for parcel delivery services to existing TSG customers purchasing PFW services on a reseller basis.<sup>115</sup> For example:

- a) [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG) on 22 January 2016 to let him know that one of TSG’s customers, [Customer 58], had “contacted our depot and asked if he can have an account directly with PF[W]”. He further confirmed that “He has been told that we [PFW] cannot progress this with him”.<sup>116</sup>
- b) On 1 June 2016, a potential customer, [Customer 64], emailed PFW to enquire about using their services, noting that they were sending “some ...parcels with Parcelforce through Despatch Bay”.<sup>117</sup> On 2 June 2016, [Individual PFW11] (PFW)<sup>118</sup> forwarded the email to [Individual PFW8] (PFW) saying “we will inform him that unfortunately at this time we will have to decline the quote directly”.<sup>119</sup>

### Examples where PFW’s existing direct customer was provided a quote for parcel delivery services via TSG

2.58 The evidence shows that the Customer Restriction was enforced from time to time during the Relevant Period in scenarios where TSG had provided a quote to one of PFW’s existing direct customers for parcel delivery services via TSG. This included:

- a) **active sales:** where TSG approached an existing direct PFW customer; and/or
- b) **passive sales:** where a direct PFW customer was actively seeking a more competitive deal from TSG.

2.59 In these cases, the Customer Restriction operated to prevent TSG from providing parcel delivery services to customers who were already purchasing such services directly from PFW.

#### Active sales

2.60 Evidence obtained during Ofcom’s investigation has provided numerous examples of the Customer Restriction being enforced in circumstances where TSG had approached and

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<sup>113</sup> Email dated 20 May 2016 (15:46) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0657).

<sup>114</sup> Email dated 22 May 2016 (22:51) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0659).

<sup>115</sup> See also examples related to [Customer 47], [Customer 6], [Customer 7], [Customer 19], [Customer 20], [Customer 25], [Customer 69], [Customer 88], [Customer 85] and [Customer 90], [Customer 17] in Annex 5.

<sup>116</sup> Email dated 22 January 2016 (11:53) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0037).

<sup>117</sup> Email dated 1 June 2016 (16:44) from [Customer 64] (Customer) to [Individual PFW15] (PFW) (RMG0049).

<sup>118</sup> Email dated 2 June 2016 (08:33) from [Individual PFW15] (PFW) to [Individual PFW11] (PFW) (RMG0049).

<sup>119</sup> Email dated 2 June 2016 (08:53) from [Individual PFW11] (PFW) to [Individual PFW8] (PFW) (RMG0049).

provided a quote for parcel delivery services to a customer already purchasing directly from PFW. In these cases, PFW sought to enforce the Customer Restriction from time to time to prevent TSG from selling parcel delivery services to customers already purchasing directly from PFW. For example:<sup>120</sup>

- a) On 9 March 2015, [Individual PFW10] (PFW) emailed [Individual TSG3] (TSG) noting that its customer, [Customer 29], *“has had a visit from one of DB’s [Despatch Bay] sales execs who has quoted direct and undercut the existing rate paid.”*<sup>121</sup> [Individual TSG3] (TSG) subsequently replied: *“We’ve found the customer, they told us they were using UK Mail? Anyway, we will pull out of the deal”*.<sup>122</sup>
- b) On 16 March 2015, [Individual PFW10] (PFW) emailed [Individual TSG3] (TSG) in relation to a customer, [Customer 31], stating: *“I’ve received a complaint from the area, the above company is an existing customer of PFW but I understand that Despatch Bay emailed them recently and have since visited site. Please investigate and advise”*.<sup>123</sup> [Individual TSG3] (TSG) responded to [Individual PFW10] (PFW) on the same day, saying: *“Apologies, we have pulled out”*.<sup>124</sup>

2.61 In several instances, we observed the Customer Restriction being enforced at the point TSG sent a customer’s details to PFW to set up scheduled parcel collections for that customer (following contractual negotiations between TSG and the customer). PFW would then check the customer details on their internal systems and notice that TSG’s prospective customer was already being provided parcel delivery services directly by PFW. PFW would then highlight this to TSG and state that it was unable to set up parcel delivery services for the customer in question, thereby seeking to prevent TSG from providing services to that customer. For example:<sup>125</sup>

- a) On 7 June 2016, [Individual TSG9] (TSG) emailed [Individual PFW8] (PFW) to set up a *“daily schedule collection”* for a customer, [Customer 65].<sup>126</sup> [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG): *“This customer is a direct trading customer of Parcelforce. Can you please withdraw your quote and investigate how this came about.”*<sup>127</sup> [Individual TSG3] (TSG) responded to note that the *“customer was a prospect picked up from eBay...There was no mention at all they are using PFW. The first question we ask is who they use before we proceed with the sales process. We would be happy to withdraw from them if you are getting the 30+ parcels a day they have*

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<sup>120</sup> See also examples related to [Customer 11], [Customer 12], [Customer 26], [Customer 27], [Customer 49], [Customer 46], [Customer 34], [Customer 60], [Customer 52], [Customer 33] and [Customer 32] at Annex 5.

<sup>121</sup> Email dated 9 March 2015 (16:14) from [Individual PFW10] (PFW) to [Individual TSG3] (TSG) (RMG0493).

<sup>122</sup> Email dated 9 March 2015 (16:34) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0493).

<sup>123</sup> Email dated 17 March 2015 (07:18) from [Individual PFW10] (PFW) to [Individual TSG3] (TSG) (RMG0501/TSG0151).

<sup>124</sup> Email dated 17 March 2015 (10:02) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0501/TSG0151).

<sup>125</sup> See also examples related to [Customer 68], [Customer 81], [Customer 80], [Customer 82], [Customer 8], [Customer 10], [Customer 55], [Customer 66], and [Customer 70] in Annex 5. See also the example relating to [Customer 38], although PFW eventually decided not to enforce the Customer Restriction.

<sup>126</sup> Email dated 7 June 2016 (13:39) from [Individual TSG9] (TSG) to [Individual PFW8] (PFW) (RMG0662/TSG0164).

<sup>127</sup> Email dated 7 June 2016 (14:01) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0662/TSG0164).

*mentioned they are sending with Interlink ”.*<sup>128</sup> [Individual PFW8] (PFW) responded to confirm that the customer was *“a trading customer of PFW...Therefore can you withdraw your offer please.”*<sup>129</sup>

- b) On 7 September 2016, [Individual TSG10] (TSG) emailed [Individual PFW8] (PFW), to request PFW to set up a *“scheduled collection”* for [Customer 73].<sup>130</sup> [Individual PFW8] (PFW) responded on 9 September 2016 to note that *“I cannot set this customer up as they are already a trading customer of PFW directly”*.<sup>131</sup> [Individual TSG3] (TSG) subsequently confirmed: *“...he did not mention he was using PFW when we spoke to him. We have pulled out.”*<sup>132</sup>

2.62 Other evidence demonstrates scenarios where several of PFW’s existing customers had contacted PFW to query the price they were paying for parcel delivery services, on the basis they had received more competitive quotes from TSG for seemingly the same services. In these circumstances, we observed PFW intervening to enforce the Customer Restriction and prevent TSG from contracting with those customers for parcel delivery services. For example:<sup>133</sup>

- a) On 5 January 2015, [Individual PFW10] (PFW) emailed [Individual TSG3] (TSG) to highlight that *“apparently DB [Despatch Bay] have approached an existing customer [Customer 26], based in Manchester, who have been trading since 2012 and undercut our existing rates”*.<sup>134</sup> [Individual TSG3] (TSG) later responded to confirm that *“we contacted the customer in Feb 2014 and quoted but pulled out as they are with you directly. There has been no contact since then...”*.<sup>135</sup>
- b) In March 2015, PFW was informed by one of its existing customers, [Customer 29], that TSG had *“pop [sic] into their premises and quote [sic] them”*.<sup>136</sup> [Individual PFW13] (PFW) emailed [Individual PFW10] (PFW) to ask: *“Are you able to check this for me, as I always thought the Despatch Bay were not able to approach/quote existing PFWW [sic] account [sic]?”*.<sup>137</sup> In response, [Individual PFW10] (PFW) confirmed that she had *“emailed them”*,<sup>138</sup> i.e. TSG, and subsequently that *“DB [Despatch Bay] have confirmed they will pull out of the deal”*.<sup>139</sup>

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<sup>128</sup> Email dated 7 June 2016 (14:07) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0662/TSG0164).

<sup>129</sup> Email dated 7 June 2016 (14:28) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0662/TSG0164).

<sup>130</sup> Email dated 7 September 2016 (14:01) from [Individual TSG10] (TSG) to [Individual PFW8] (PFW) (RMG0683/TSG0165).

<sup>131</sup> Email dated 9 September 2016 (12:15) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0683/TSG0165).

<sup>132</sup> Email dated 9 September 2016 (12:15) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0683/TSG0165).

<sup>133</sup> See also examples related to [Customer 4] and [Customer 12] in Annex 5.

<sup>134</sup> Email dated 5 January 2015 (13:38) from [Individual PFW10] (PFW) to [Individual TSG3] (TSG) (RMG0472).

<sup>135</sup> Email dated 5 January 2015 (14:02) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0472).

<sup>136</sup> Email dated 9 March 2015 (16:08) from [Individual PFW13] (PFW) to [Individual PFW10] (PFW) (RMG0495).

<sup>137</sup> *Ibid.*

<sup>138</sup> Email dated 9 March 2015 (16:18) from [Individual PFW10] (PFW) to [Individual PFW13] (PFW) (RMG0495).

<sup>139</sup> Email dated 9 March 2015 (16:40) from [Individual PFW10] (PFW) to [Individual PFW13] (PFW) (RMG0495).



*Passive sales*

- 2.63 We have observed examples of existing direct PFW customers approaching TSG to seek the provision of PFW parcel delivery services on a reseller basis (for example, seeking more competitive prices). The evidence shows that PFW took steps to ensure the Customer Restriction was enforced in these circumstances, so that TSG did not contract with the existing PFW direct customer on a reseller basis. For example:<sup>140</sup>
- a) In March 2014, a company called [Customer 12] appeared to have agreed a contract with PFW but then subsequently contacted TSG to seek a further quotation.<sup>141</sup> On 18 March 2014, [Individual PFW10] (PFW) emailed TSG to query what had occurred and then later emailed her PFW colleague, [Individual PFW16] (PFW) to explain that TSG had said *“There was no mention of PFW so it would appear that DB [Despatch Bay] have not done anything untoward... DB [Despatch Bay] have confirmed they will walk away from the customer as they are dealing direct”*.<sup>142</sup> This is supported by an email from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) on 18 March 2014, confirming he was *“happy to pull out of the quote”*.<sup>143</sup>
  - b) On 14 June 2016, [Individual TSG3] (TSG) forwarded [Individual PFW8] (PFW) an email from an existing PFW customer, which stated that their *“preferred carrier (of those available through Despatch Bay) is Parcelforce”*.<sup>144</sup> [Individual PFW8] (PFW) later responded to [Individual TSG3] (TSG) to state: *“They are in an active trading relationship with PFW... Can I therefore asked [sic] again that you back away from this customer to support our strategic relationship”*.<sup>145</sup> [Individual TSG3] (TSG) confirmed that TSG had *“pulled out”* of discussions with the customer.<sup>146</sup>
- 2.64 In other cases,<sup>147</sup> TSG appeared to withdraw from discussions with existing direct PFW customers without intervention from PFW. For example, upon being contacted by PFW in relation to TSG approaching its customer, [Customer 57], [Individual TSG3] (TSG) confirmed: *“We have not quoted anything and backed off immediately when we found out he had a direct contract”*.<sup>148</sup>

## Scope of the Customer Restriction – application to other postal operators

- 2.65 We set out above our view that the Customer Restriction applied to direct or indirect customers of PFW. In this section, we explain that the Customer Restriction also applied to existing TSG customers utilising non-PFW parcel delivery services, e.g. Yodel. This meant that PFW was, at times, restricted from supplying parcel delivery services to TSG’s existing

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<sup>140</sup> See also examples relating to [Customer 67] and [Customer 83] in Annex 5.

<sup>141</sup> Email dated 14 March 2014 (16:43) from [Customer 12] to [Individual PFW21] (PFW) (RMG0357).

<sup>142</sup> Email dated 18 March 2014 (06:48) from [Individual PFW10] (PFW) to [Individual PFW16] (PFW) (RMG0357).

<sup>143</sup> Email dated 17 March 2014 (20:41) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0358).

<sup>144</sup> Email dated 14 June 2016 (08:30) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0667).

<sup>145</sup> Email dated 14 June 2016 (13:08) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0669).

<sup>146</sup> Email dated 14 June 2016 (13:16) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0670).

<sup>147</sup> See also examples relating to [Customer 4] and [Customer 60] in Annex 5.

<sup>148</sup> Email dated 5 January 2016 (16:53) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0037).

customers, even where those customers were currently purchasing non-PFW parcel delivery services. This is supported by the following examples:<sup>149</sup>

- a) In August 2013, an existing customer of TSG, [Customer 1], moved from purchasing Yodel's parcel delivery services via TSG to purchasing services from PFW directly. After TSG became aware and highlighted the matter to PFW,<sup>150</sup> in October 2013, PFW decided to *"give this customer notice of termination due to a mutual agreement between Sale Group/ Despatch Depot [Bay] and PFW of none [sic] approach of each others [sic] customers"*.<sup>151</sup>
- b) [Individual PFW2] (PFW) emailed [Individual PFW8] (PFW) to set out the rule which in his view was being applied: *"Having talked it through we have a way forward on this issue. IF [sic] they come across a customer who uses PFW, they walk away. IF [sic] we come across a customer who uses Despatch Bay (PFW or Yodel), we walk away. Clearly, if a customer doesn't make us aware that they use Despatch Bay we would struggle to apply this rule"*.<sup>152</sup> [Individual PFW6] (PFW) responded on the same day to agree, noting: *"In telesales we hear Despatch Bay and go no further we have never asked which carrier through DB [Despatch Bay] so this is fair."*<sup>153</sup>
- c) On 26 June 2015, [Individual PFW8] (PFW) emailed [Individual PFW17] (PFW) to state: *"I have been notified by Despatch Bay that we have signed up their customer below and they have therefore requested that we pull out of the deal. This customer has been using them for some time posting with Yodel"*.<sup>154</sup> In relation to the same customer, [Individual PFW2] (PFW) confirmed to [Individual PFW6] (PFW) that *"We can't take their Yodel users is the quid pro quo that stops them selling Yodel to our customers. It's an established and agreed rule whether we like it or not unfortunately"*.<sup>155</sup>
- d) Also on 26 June 2015, [Individual PFW2] (PFW) shared some meeting minutes from a TSG meeting with PFW colleagues, noting: *"PFW has signed up one of their [TSG] customers with first collection yesterday (great). [Individual PFW8] has spoken to [Individual PFW17] who's not happy but this is the rule that says we can't take their Yodal [sic] customers and they can't sell Yodel to our customers..."*<sup>156</sup> He noted in a subsequent email: *"...we see occasional examples [...] where we sell PFW against Yodel only to find (if we weren't aware) that they use Yodel via DB [Despatch Bay]. The long*

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<sup>149</sup> See also examples relating to [Customer 87], [Customer 86], [Customer 30] and [Customer 84] in Annex 5.

<sup>150</sup> Email dated 5 August 2013 (14:00) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0244).

<sup>151</sup> Email dated 9 October 2013 (21:11) from [Individual PFW16] (PFW) to [Individual PFW23] (PFW) (RMG0312).

<sup>152</sup> Email dated 18 May 2015 (10:18) from [Individual PFW2] (PFW) to [Individual PFW8] (PFW) (RMG0516).

<sup>153</sup> Email dated 18 May 2015 (10:21) from [Individual PFW6] (PFW) to [Individual PFW2] and others (PFW) (RMG0516).

<sup>154</sup> Email dated 26 June 2015 (09:43) from [Individual PFW8] (PFW) to [Individual PFW17] (PFW) (RMG0568).

<sup>155</sup> Email dated 26 June 2015 (10:16) from [Individual PFW2] (PFW) to [Individual PFW6] (PFW) (RMG0577).

<sup>156</sup> Email dated 26 June 2015 (10:49) from [Individual PFW2] (PFW) to [Individual PFW18] (PFW) and [Individual PFW6] (PFW) (RMG0221).

*established rule is that we leave their customers alone and they leave ours alone. This protects them of course but also stops them selling Yodel against us”.*<sup>157</sup>

- 2.66 Similarly, TSG was, from time to time, prevented from selling non-PFW parcel delivery services to PFW’s direct customers or customers purchasing PFW services via another reseller channel. This is supported by the following evidence:
- a) On 30 April 2015, [Individual PFW8] (PFW) notified [Individual TSG3] (TSG) that *“Parcelforce already delivers [...] traffic”* for [Customer 32] and requested TSG to *“withdraw your quote to this customer”*.<sup>158</sup> [Individual TSG3] (TSG) responded to confirm [Customer 32] was using Parcel Hub and noted: *“If they use PF[W] through Parcel Hub then we are still Ok to take this business as its not direct”*.<sup>159</sup> When the matter was referred to [Individual PFW6] (PFW), she set out her view: *“As far as I am concerned the parcels are in our network already and not new”*.<sup>160</sup> She further noted: *“They [TSG] need to withdraw”*.<sup>161</sup> [Individual PFW8] (PFW) confirmed he would *“call them [TSG] in the morning and ask them again to withdraw their prices”*.<sup>162</sup>
  - b) On 26 October 2015, TSG’s customer, [Customer 52], informed [Individual PFW19] (PFW) that TSG was withdrawing its PFW services. The customer forwarded a copy of the email from TSG, which stated: *“After every effort on our behalf I have been informed by ParcelForce that we must withdraw our services on [Customer 52]... The [sic] means you will be unable to use any parcel services through Despatch Bay and that the Yodel collection and delivery options we have set up have [sic] must be cancelled.”*<sup>163</sup> The email was forwarded to [Individual PFW2] (PFW), who subsequently confirmed: *“They [TSG] should not take work from us and vice versa. They should not sell pfw [sic] or yodel [sic] against us”*.<sup>164</sup>
- 2.67 Contemporaneous evidence sets out PFW’s understanding of the application of the Customer Restriction in relation to TSG customers using non-PFW services:
- a) An internal PFW Powerpoint presentation dated December 2015 and entitled *“TSG contract, A plan to reach a new agreement”*, sets out the ‘agreement’ as:
    - “Non-compete (TSG will not sell to a PFW contract customer, PFW will not sell to a TSG customer)*
    - *This stops TSG selling Yodel to a PFW customer BUT it prevents PFW selling against Yodel if the customer uses Yodel via TSG – very difficult to manage as we do not*

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<sup>157</sup> Email dated 26 June 2015 (11:17) from [Individual PFW2] (PFW) to [Individual PFW11] (PFW) and [Individual PFW6] (PFW) (RMG0571).

<sup>158</sup> Email dated 30 April 2015 (10:46) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0510).

<sup>159</sup> Email dated 30 April 2015 (11:17) from [Individual TSG3] (TSG) to [Individual PFW8] (PFW) (RMG0510).

<sup>160</sup> Email dated 30 April 2015 (16:52) from [Individual PFW6] (PFW) to [Individual PFW8] (PFW) (RMG0510).

<sup>161</sup> Email dated 30 April 2015 (19:29) from [Individual PFW6] (PFW) to [Individual PFW8] (PFW) (RMG0510).

<sup>162</sup> Email dated 30 April 2015 (20:58) from [Individual PFW8] (PFW) to [Individual PFW6] (PFW) (RMG0510).

<sup>163</sup> Email dated 26 October 2015 (09:58) from [Customer 52] to [Individual PFW19] (PFW) (RMG0625).

<sup>164</sup> Email dated 26 October 2015 (11:11) from [Individual PFW2] (PFW) to [Individual PFW19] (PFW) (RMG0625).

*know who their Yodel customers are, quite often when there is conflict they say they are a Yodel customer and we are required to back off...*<sup>165</sup>

- b) On 28 March 2016, [Individual PFW8] (PFW) explained to [Individual PFW19] (PFW) that: *“The current agreement that is in place with Despatchbay [sic] is that we will not quote for any customers of theirs irrespective of the carrier they have are using.”*<sup>166</sup> This example concerned a customer using *“UK mail – via despatch bay [sic]”*.<sup>167</sup>
- 2.68 However, we have observed one example in 2017 where PFW refused to withdraw a quote from a customer, despite them already being an existing TSG customer purchasing Yodel parcel delivery services. On 21 June 2017, [Individual PFW6] (PFW) emailed her PFW colleagues to clarify: *“We have a very loose agreement that if a prospective customer used despatch bay full stop then we should (if we know) not quote for the business...”*<sup>168</sup> However, she also notes that, if PFW were to withdraw its quote, it would cause *“issues with the customer”* who should *“be able to choice [sic] who they use”*.<sup>169</sup> [Individual PFW8] (PFW) later confirmed: *“I just told Despatch bay [sic] that we wouldn’t withdraw it and they are not happy about that, claiming we have technically poached their customer”*.<sup>170</sup>
- 2.69 On the basis of the evidence set out above, we have concluded that the scope of the Customer Restriction included existing customers of TSG utilising non-PFW parcel delivery services (save for the one example set out in paragraph 2.68 in which the Customer Restriction was not applied) in addition to direct or indirect customers of PFW.

## Exceptions to the Customer Restriction

- 2.70 Notwithstanding Ofcom’s findings as to the existence of the Customer Restriction above, for completeness, Ofcom notes that there is some evidence that demonstrates there was a lack of consistent enforcement of specific aspects of the scope of the Customer Restriction or certain activities which fell out of scope. For completeness, these are described briefly below.
- a) **International sales:** Although there is one early example to the contrary,<sup>171</sup> the evidence demonstrates that the Parties considered there to be a ‘rule’ relating to an exception to the Customer Restriction regarding customers being able to purchase domestic services from one Party and international services from the other, without

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<sup>165</sup> PFW document, *TSG Contract, A plan to reach a new agreement*, slide 5 (RMG0640) (attached to email dated 16 December 2015 (12:59) from [Individual PFW8] (PFW) to [Individual PFW2] (PFW) (RMG0639). See also example related to [Customer 84] in Annex 5, where [Individual PFW8] (PFW) notes that PFW would not be *“allowed”* to bid for traffic lost to Yodel via TSG (Email dated 19 February 2018 (11:56) from [Individual PFW8] (PFW) to [Individual PFW20] (PFW) (RMG0103).

<sup>166</sup> Email dated 28 March 2018 (13:40) from [Individual PFW8] (PFW) to [Individual PFW19] (PFW) (RMG0106).

<sup>167</sup> *Ibid.*

<sup>168</sup> Email dated 22 June 2017 (17:51) from [Individual PFW6] (PFW) to [Individual PFW8] (PFW) and [Individual PFW3] (PFW) (RMG0704/TSG0162).

<sup>169</sup> *Ibid.*

<sup>170</sup> Email dated 23 June 2017 (18:17) from [Individual PFW8] (PFW) to [Individual PFW6] (PFW) (RMG0704/TSG0162).

<sup>171</sup> See example relating to [Customer 13] in Annex 5.

contravening the Customer Restriction.<sup>172</sup> We have therefore concluded that the Customer Restriction did not extend to circumstances where a customer purchased domestic services from one Party and international services from the other.

- b) **Packet customers:** We note that TSG, acting in its capacity as a consolidator, offered packet<sup>173</sup> delivery services from Royal Mail, which was governed by a separate agreement with Royal Mail.<sup>174</sup> On the basis of the available evidence, we have concluded that the scope of the Customer Restriction did not extend to circumstances where TSG was providing a quote for packet (not parcel) delivery services to an existing PFW customer.<sup>175</sup>

2.71 However, we do not consider that these exceptions alter Ofcom's findings as to the Parties' fundamental understanding of the scope and operation of the Customer Restriction.

2.72 We have also noted that there was uncertainty about whether the Customer Restriction extended to prospective customers. Certain examples demonstrate that the Customer Restriction was not enforced or considered to apply in cases where both Parties were in contractual negotiations with the same prospective customer at or around the same time.<sup>176</sup> However, other evidence suggests that the Parties had conflicting views on the application of the Customer Restriction in these circumstances.<sup>177</sup> Based on the evidence, we consider that the Parties did not consistently enforce the Customer Restriction in such circumstances.

2.73 Furthermore, we have observed other examples which suggest that from time to time the Customer Restriction was not enforced for varying reasons. However, we consider that these instances do not demonstrate a clear pattern of behaviour or agreed exception to the scope of the restriction. We set these out below.

- a) **Time limits:** We have observed occasional references to time limits applying to the Customer Restriction.<sup>178</sup>

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<sup>172</sup> See examples relating to [Customer 22], [Customer 15], [Customer 36], [Customer 62], [Customer 82] and [Customer 52] in Annex 5.

<sup>173</sup> Packets are essentially small parcels that can be sent through Royal Mail's postal service.

<sup>174</sup> Royal Mail's 7 September 2018 response to Question 1 of Ofcom's Information Request dated 13 August 2018 (RMG0231).

<sup>175</sup> See examples relating to [Customer 8], [Customer 34], [Customer 27], [Customer 60] and [Customer 82] in Annex 5.

<sup>176</sup> See examples relating to [Customer 21], [Customer 5] and [Customer 22] in Annex 5.

<sup>177</sup> See also examples in Annex 5 related to [Customer 42], [Customer 46] and [Customer 74]. See also the document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229). See, in particular, entries on the following Excel rows: 4,870 ("*He confirmed that they are just about to sign up into a direct contract with PF. Advised that I cannot take the call any further*"); 5,592 ("*[Individual TSG3] has told us to back off as parcelforce had quoted them before I did*").

<sup>178</sup> See also example relating to [Customer 40], [Customer 4], [Customer 6], [Customer 51], [Customer 38] and [Customer 70] in Annex 5.

- b) **One or both Parties decide not to enforce in specific circumstances:** We have observed examples where one or both Parties decided not to enforce the Customer Restriction in relation to specific customers.<sup>179</sup>
- c) **Other numerical rules:** We have noted references to limitations to the Customer Restriction regarding the percentage of traffic held by one Party compared to the other Party, in relation to who should provide parcel delivery services to specific customers.<sup>180</sup>

2.74 We do not consider that any of the evidence highlighted in the paragraph above demonstrates a consistent pattern of behaviour such that it would constitute an agreed exception or limitation to the Customer Restriction. We have therefore concluded that, while the above cases serve to illustrate a certain level of inconsistency in how the Customer Restriction was applied in individual cases, they do not demonstrate the existence of any exceptions to the scope or operation of the Customer Restriction.

### Conclusions on monitoring and enforcement of the Customer Restriction

- 2.75 Ofcom considers that, while there are some exceptions to the Customer Restriction as set out above, the evidence set out in this section (and Annex 5) demonstrates that the Parties, during the Relevant Period:
- a) understood and were aware of the Customer Restriction;
  - b) actively monitored the application of the Customer Restriction; and
  - c) consistently took steps to enforce the Customer Restriction.

### Competitive relationship between the Parties

- 2.76 Ofcom has additionally considered what the evidence shows about the competitive relationship between the Parties, as this is relevant to the legal assessment in Section 3.
- 2.77 Ofcom has found that the Relevant Market is the retail supply of express parcel delivery services to business customers based in the UK (see Annex 3). The services supplied by PFW to TSG under their commercial relationship concern PFW's supply of express parcel delivery services, which is an activity upstream to the Relevant Market Ofcom has identified. However, it is not unusual for undertakings to be active at more than one level of the supply chain such that a supplier and customer both compete on the downstream market.

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<sup>179</sup> See also examples relating to [Customer 28], [Customer 19], [Customer 16], [Customer 39], [Customer 79], [Customer 38], [Customer 9], [Customer 44], [Customer 21] and [Customer 40] in Annex 5.

<sup>180</sup> See examples relating to [Customer 47] and [Customer 78] in Annex 5.

2.78 Indeed, Ofcom has found that the Parties were both active competitors on the Relevant Market during the Relevant Period. The evidence that we have taken into account in reaching this conclusion is set out below:<sup>181</sup>

- a) The Parties are both active at the same level of the supply chain i.e. the retail supply of express parcel delivery services to business customers.<sup>182</sup> PFW is active throughout the supply chain of express parcel delivery services, providing physical collection and delivery services and selling directly to end customers (i.e. the sender of the parcel) at the retail level.<sup>183</sup> TSG operates at the retail level by reselling parcel delivery services to end customers from several operators (including PFW).<sup>184</sup>
- b) The Parties viewed each other as competitors. TSG has submitted to Ofcom that PFW is both TSG's supplier and competitor and that the "*carriers are TSG's main competition*".<sup>185</sup> Similarly, internal PFW correspondence references TSG as a "*competitor*"<sup>186</sup> and contemporaneous correspondence between the Parties notes that PFW would see TSG as "*directly competing*" with them.<sup>187</sup>
- c) There is price competition between the Parties. TSG has submitted to Ofcom that its customer offering (including shipping labels) was generally, but not always, "*at stronger rates than the carriers*"<sup>188</sup> and contemporaneous documentary evidence demonstrates that price (including the application of surcharges) was at least one parameter of competition between the Parties.<sup>189</sup>

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<sup>181</sup> We note that, on its face, the Services Agreement concerns PFW's supply of parcel delivery services from PFW to TSG. However, Ofcom has found that there is insufficient evidence to demonstrate that the Services Agreement governed the commercial relationship between the Parties. Therefore, it cannot be considered to be an exclusive or even reliable source of evidence of the nature of the relationship between the Parties.

<sup>182</sup> See paragraph A3.10 below.

<sup>183</sup> See paragraph 2.7 and A3.10.

<sup>184</sup> See paragraph 2.11 above and A3.10 below. See also (i) email dated 29 December 2014 (16:28) from [Customer 26] to [Individual PFW13] (PFW): "*Given that the service is the same i.e. delivery through ParcelForce, it seems to make a lot of financial sense for us to book through Despatch Day [sic] instead of through our own ParcelForce account! We're happy with ParcelForce's overall service so it's not like we want to leave you but these rates are so much better for what I assume is exactly the same service*" (RMG0466); and (ii) email dated 26 July 2016 (11:54) from [Individual PFW8] (PFW) to [Individual TSG1] (TSG): "*From a commercial point (and I fully appreciate they want your integration), by coming back via you they will be accessing the same service at cheaper prices (£[redacted]) than they had direct with us as they [redacted]*" (RMG0676).

<sup>185</sup> Minutes from meeting between Ofcom & TSG on 30 August 2018 (TSG0014).

<sup>186</sup> Email dated 26 June 2015 (11:56) from [Individual PFW11] (PFW) to [Individual PFW2] (PFW), which noted that the 'rule' i.e. the Customer Restriction "*favours a competitor over our own sales people*" (RMG0648).

<sup>187</sup> See email dated 17 January 2018 (12:29) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) that notes "*Once I agree to set this scheduled collection up I imagine any PFW parcels they post will be via you as you must have undercut their account PFW prices to get this traffic. The PFW sales person will then see their account and revenue migrate to you and will obviously view this as directly competing with us.*" (RMG0082). See also examples related to [Customer 22] and [Customer 24] in Annex 5.

<sup>188</sup> Minutes from meeting between Ofcom & TSG on 30 August 2018 (TSG0014).

<sup>189</sup> See, for example, (i) email dated 20 September 2013 (13:44) from [Individual PFW10] (PFW) to [Individual PFW5] (PFW) which notes that a customer did "*not want to use DB [Despatch Bay] because it is more than likely because of the [redacted] applied for shipping goods [redacted] – no wonder they want to trade direct with us as for [redacted].*" (RMG0270); (ii) email dated 2 October 2013 (16:33) from [Individual PFW3] (PFW) to [Individual PFW10] (PFW) and others, noting that the relevant customer "*moved because of [redacted] Sale Group which they passed on. Net result of aking [sic] them direct [redacted]. They are using the same carrier only getting the service cheaper with [redacted]. I suggest we [redacted] on the direct account and then let's see what happens*" (RMG0290); (iii) email dated 10 October 2013 (09:32) from [Individual PFW27] (PFW) to [Individual PFW12]

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- d) The Parties compete on other relevant competitive parameters. For example, TSG considers that its customer service “*is the added value of Despatch Bay’s service*”.<sup>190</sup> This is supported by contemporaneous documentary evidence.<sup>191</sup>
- e) Customers sought to, and did in fact, switch (or at least attempt to switch)<sup>192</sup> between the Parties for express parcel delivery services on the basis of pricing or quality of service.<sup>193</sup> The evidence shows that customers are likely to switch between using parcel operators direct and resellers in order to obtain a better price.<sup>194</sup> There is also evidence of actual substitution between PFW and TSG (on those occasions where the Customer Restriction was not enforced).<sup>195</sup>

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and others (PFW): “*What this basically says is that the mark up from Despatch Bay means that customers can get a better deal direct.*” (RMG0305); (iv) email dated 11 November 2013 (10:17) from [Customer 4] to [Individual PFW28] (PFW): “*I have been quoted better rates for the volumes that we are doing by dispatch [sic] bay - who are an intermediary for Parcel Force. It’s very disappointing that Parcel Force are quoting higher rates for dealing direct - for a customer that they have had for 5+ years*” (RMG0313); (v) email dated 19 June 2014 (13:35) from [Individual PFW6] (PFW) to [Individual PFW11] (PFW): “*All sale group customers pay [£<] ( of course our customers don’t get that so we get approaches from customers trying to avoid those costs*” (RMG0420); (vi) Email dated 29 December 2014 (16:28) from [Customer 26] to [Individual PFW13] (PFW): “*Given that the service is the same i.e. delivery through ParcelForce, it seems to make a lot of financial sense for us to book through Despatch Day instead of through our own ParcelForce account! We’re happy with ParcelForce’s overall service so it’s not like we want to leave you but these rates are so much better for what I assume is exactly the same service.*” (RMG0466); (vii) Email dated 3 June 2015 (14:51) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG): “*I would like this customer to use their existing PFW account to send these packets to you, this avoids them being given a parcel rate by DB [Despatch Bay] that will be less than the rate PFW currently have with them. Therefore removing conflict of rates*” (RMG0529). See also examples relating to [Customer 36], [Customer 57], [Customer 70], [Customer 75], [Customer 83], [Customer 1], [Customer 4], [Customer 7], [Customer 19], [Customer 27], [Customer 28], [Customer 29], [Customer 33], [Customer 34], [Customer 37], [Customer 39], [Customer 41], [Customer 43], [Customer 45] and [Customer 59] in Annex 5.

<sup>190</sup> Minutes from meeting between Ofcom & TSG on 30 August 2018 (TSG0014).

<sup>191</sup> See, for example, email dated 29 July 2014 (20:32) from [Individual PFW25] (PFW) to [Individual PFW10] (PFW): “*[£<]’s understanding is [£<] were going to move away from Despatch Bay due to what they described as poor customer service feedback*” (RMG0424). See also examples related to [Customer 58], [Customer 18], [Customer 25], [Customer 28] and [Customer 70] in Annex 5.

<sup>192</sup> See paragraphs 2.70 to 2.74 above, where we note examples where the Customer Restriction was not consistently enforced. We have found that such examples of non-enforcement do not demonstrate a consistent pattern of behaviour such that it would constitute an agreed exception or limitation to the Customer Restriction (paragraph 2.74). Similarly, we do not consider that isolated examples of actual substitution between the Parties affect our finding that the Parties had entered into an understanding not to offer or supply parcel delivery services to each other’s customers.

<sup>193</sup> See, for example: (i) email dated 9 October 2013 (19:57) from [Customer 1] to [Individual PFW24] (PFW): “*We cannot understand why our agreement has been terminated. We were previously using Yodel’s service through Despatch Bay. We approached you as we were dissatisfied with the service we were receiving. Just to clarify... We were not using Parcelforce through Despatch Bay*” (RMG0305); (ii) email dated 23 May 2014 (09:33) from [Individual PFW11] (PFW) to [Individual PFW10] (PFW): “*[Customer 16] [...] was a big account and it was absolutely poached by DB [Despatch Bay]... for a significantly lower rate*” (RMG0413); (iii) email dated 7 August 2015 (11:58) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG): “*One of our telesales staff has been in talks with the customer below, they had given them prices and the customer was keen to work with us. However prior to getting setup they were contacted buy one of your sales guys who I am told undercut our prices and now the customer is saying they will use us via you instead. We would therefore like you to investigate this and withdraw your offer if you have made one.*” (RMG0607); (iv) email dated 17 February 2015 (10:38) from [Customer 28] to [Individual PFW22] (PFW): “*the current third party service that we get from Dispatch [sic] bay just doesn’t deliver the customer service level that we need as a business...therefore I need to have a direct relationship with parcel force if we can get this to a competitive pricing model*” (RMG0483). See also examples related to [Customer 18], [Customer 35], [Customer 43], [Customer 38] and [Customer 20] in Annex 5.

<sup>194</sup> See paragraph A3.14c) below.

<sup>195</sup> See: (i) email dated 13 August 2014 (14:22) from [Individual PFW29] (PFW) to [Individual PFW30] (PFW): “*The customer was using us directly and because of price they moved their traffic and now use us with despatch bay. They pay £[£<] with*



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- f) Each Party competed for the acquisition of ‘new’ customers (apart from in circumstances where the Customer Restriction was deemed to apply).<sup>196</sup>
- g) But for the Customer Restriction, each Party would have sought to acquire the customers of the other Party.<sup>197</sup>
- h) Except in the circumstances described in paragraph (i) below, the Parties competed where TSG’s service offering to customers used parcel delivery services of a service provider other than PFW (e.g. Yodel, DX, DHL etc.).<sup>198</sup>
- i) The Customer Restriction extended beyond the remit of direct or indirect PFW services, to:
  - i) prevent PFW from supplying parcel delivery services to existing TSG customers using non-PFW customers (albeit this was not always applied by PFW in such circumstances); and
  - ii) prevent TSG from supplying parcel delivery services to existing direct PFW customers or customers purchasing PFW parcel delivery services via another reseller.<sup>199</sup>

2.79 Ofcom therefore considers that the evidence demonstrates that both Parties were active competitors on the Relevant Market during the Relevant Period.

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*DB and were paying £[redacted] direct with us” (RMG0431); (ii) email dated 3 June 2015 (09:33) from [Individual TSG3] (TSG) to [Individual PFW7] (PFW) which notes: “This customer was a Despatch Bay customer that PFW had taken from us in March 2014; We have won the customer back as they were ours in the first place.” (RMG0093); and (iii) email dated 5 June 2015 (12:21) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG), where the customer [Customer 38] “notified PFW that they want their account terminated...obviously because they want to go with you [TSG] as you have quoted a cheaper price” (see (RMG0541)). See also examples relating to [Customer 39], [Customer 46], [Customer 19], [Customer 16], [Customer 28], [Customer 35], [Customer 36], [Customer 37], [Customer 50] and [Customer 45] in Annex 5.*

<sup>196</sup> See, for example, (i) email dated 26 June 2015 (10:37) from [Individual PFW8] (PFW) to [Individual PFW17] (PFW) which notes: “Please note that Despatch Bay have signed the customer below up and we are in the process of agreeing collections etc. I understand that you may have been in to see them in the last couple of days, unfortunately they have got there first so this sales lead will need to be dropped” (RMG0114); (ii) email dated 25 November 2015 (13:47) from [Individual TSG3] (TSG) to [Individual PFW8] and [Individual PFW2] (PFW) that notes: “One of our sales guys has been dealing with the below customer for a while now selling in our services. We agreed a package for them with our DX services and they were due to start with us Monday just gone. They then cancelled their schedule with us due to PFW offering some ridiculous rates for the volumes they have quoted doing. These rates are even cheaper than what we get from you for these types of volumes. This is what the customer has told us - 100 parcels per month and has been offered £[redacted] per parcel from PFW. Whenever we know someone is talking to PFW about joining we pull out of the deal, so I would expect the same from your end in the interest of partnership.” (RMG0061). See also examples related to [Customer 21], [Customer 22], [Customer 46] and [Customer 27] in Annex 5.

<sup>197</sup> See, for example, the document entitled ‘prospect-contacts-18-03-2016.csv’ (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), which records 66 instances where TSG informed prospective customers they could not offer services to them after finding out that the customer obtained services directly from PFW, due to its “partnership” with PFW. See also examples related to [Customer 1], [Customer 5], [Customer 4], [Customer 10], [Customer 11], [Customer 12], [Customer 13], [Customer 33], [Customer 34], [Customer 35], [Customer 36], [Customer 49], [Customer 47] and [Customer 16] in Annex 5.

<sup>198</sup> See examples related to [Customer 1], [Customer 8], [Customer 30], [Customer 41], [Customer 42] and [Customer 32] in Annex 5.

<sup>199</sup> See paragraphs 2.652.65-2.69 above.

## Termination of the Customer Restriction

2.80 The evidence described above and set out in Annex 5 demonstrates that the Parties continued to act in accordance with the Customer Restriction until the end of the Relevant Period.

2.81 After the end of the Relevant Period, Royal Mail sought formally to terminate the Services Agreement<sup>200</sup> and the operation of the Customer Restriction on 17 August 2018, once Ofcom had opened its investigation under the Act. Royal Mail sent a letter to TSG dated 17 August 2018, stating (emphasis as in original):

*“Agreement between Royal Mail Group Limited (trading as Parcelforce Worldwide (“PFW”) and Come Shopping.com Ltd (trading as Despatch Bay) dated 8 September 2011 (the “Agreement”)*

*Notwithstanding that the Agreement expired on 31 August 2016, to the extent (if any) that clause 11.1 was still in place, for the avoidance of doubt, this letter gives notice that clause 11.1 no longer applies to the relationship between the parties.*

*PFW shall not place any restrictions on the customers to whom TSG can sell its services and respectfully expects that no restrictions are placed on the customers to whom PFW can sell its services. For the avoidance of doubt, this is the case whether or not a new or prospective customer is an existing customer of the other party.”<sup>201</sup>*

2.82 TSG acknowledged Royal Mail’s letter on 21 August 2018 and requested a copy of the Services Agreement,<sup>202</sup> which Royal Mail sent on the same day.<sup>203</sup>

2.83 However, our view is that the Customer Restriction was only in force until the end of the Relevant Period, at which point the CMA issued a provisional marker to Royal Mail in response to its Leniency Application.

2.84 We note that on 21 November 2018, [Individual TSG11] (TSG) had emailed [Individual PFW8] (PFW) to request to set up a PFW scheduled collection for TSG’s customer, [Customer 91].<sup>204</sup> [Individual PFW1] (PFW) responded on 29 November 2018 (at 17:19) to state that “...the depot has advised this company is already using a PFW contract and we are unable to process your request”.<sup>205</sup>

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<sup>200</sup> However, as set out in paragraph **Error! Reference source not found.**, we do not have conclusive evidence that a formal contract was signed and/or formally entered by the Parties.

<sup>201</sup> Letter dated 17 August 2018 from [Individual RMGL1] (RMGL) to [Individual TSG2] (TSG) (TSG0065/RMG0187).

<sup>202</sup> Email dated 21 August 2018 (13:41) from [Individual TSG2] (TSG) to [Individual RMGL1] (RMGL) (TSG0111).

<sup>203</sup> Email dated 21 August 2018 (16:55) from [Individual RMGL1] (RMGL) to [Individual TSG2] (TSG) (TSG0112).

<sup>204</sup> Email dated 21 November 2018 (10:02) from [Individual TSG11] (TSG) to [Individual PFW8] (PFW) (TSG0173).

<sup>205</sup> Email dated 29 November 2018 (17:19) from [Individual PFW1] (PFW) to [Individual TSG11] (TSG) (TSG0173).

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- 2.85 On request from Ofcom, Royal Mail subsequently investigated this matter. Royal Mail stated that this email had been sent in error and that [Individual PFW1] (PFW) had emailed TSG again on 29 November 2018 at 17:42 to note: *“Apologies my error, I will check with the depot and process as normal”*.<sup>206</sup> Royal Mail also confirmed that it would be taking further steps internally to ensure that all relevant employees were suitably aware of the termination of the Customer Restriction.<sup>207</sup>
- 2.86 Taking into account PFW’s prompt action in rectifying its position in relation to [Customer 91], and that this appears to be a one-off standalone error, we do not consider that it impacts the termination of the Customer Restriction.

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<sup>206</sup> Email dated 29 November 2018 (17:42) from [Individual PFW1] (PFW) to [Individual TSG11] (TSG) (RMG0740).

<sup>207</sup> Email dated 4 December 2018 (13:24) from [Individual RMGL1] (RMGL) to [Individual Ofcom1] (Ofcom) and [Individual Ofcom2] (Ofcom) (RMG0739).

## 3. Legal assessment

### Introduction

- 3.1 As described in Section 2, we have found that there was an understanding between the Parties that they would not offer or supply parcel delivery services to each other's retail customers on both an active and passive basis (which we referred to as the "Customer Restriction" in Section 2).
- 3.2 Following on from this, this section sets out Ofcom's conclusion that, based on the evidence set out in Section 2 and Annex 5, the Parties' conduct infringed:
- a) the Chapter I prohibition, because it constituted an agreement that had the object of sharing the Relevant Market, through the allocation of customers between the Parties, and may have affected trade within the UK; and/or
  - b) Article 101 TFEU, because it constituted an agreement that had the object of sharing the Relevant Market, through the allocation of customers between the Parties, and may have affected trade between Member States.
- 3.3 Furthermore, Ofcom finds that the agreement between the Parties to share the Relevant Market that we have identified was neither exempted (under section 9 of the Act, Article 101(3) TFEU, or any other provision) nor excluded (under Section 3 of the Act) from the Chapter I prohibition and/or Article 101 TFEU.

### The Chapter I prohibition and Article 101 TFEU

- 3.4 The Chapter I prohibition, which is set out in Section 2 of the Act, prohibits agreements<sup>208</sup> between undertakings which may affect trade within the whole or part of the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an exclusion applies or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act.
- 3.5 Article 101(1) TFEU is similarly worded, except that as a matter of European law it prohibits agreements between undertakings where they may affect trade between EU Member States and relates to the prevention, restriction or distortion of competition within the internal market.
- 3.6 Under section 60 of the Act, Ofcom is required, so far as is possible, to deal with matters arising under UK competition law in a manner that is consistent with EU competition law. In effect this means that decisions of the European Commission and the case law of the EU

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<sup>208</sup> "Agreement" is used in the remainder of this section to include "agreement, decision or concerted practice" unless the context requires otherwise.

courts are of direct relevance and that the Chapter I prohibition and Article 101 TFEU are to be interpreted and applied in the same way.<sup>209</sup>

- 3.7 Sharing markets is expressly prohibited under section 2(2) of the Act and Article 101(1)(c) TFEU. Sharing markets through customer allocation is well established as being harmful to competition<sup>210</sup> because, by its very nature, such conduct restricts suppliers from determining independently the commercial policy which they intend to adopt on the market, and it deprives consumers of a full range of competitive offerings that might otherwise be available to them.<sup>211</sup> When one undertaking agrees with another undertaking that it will enjoy exclusive access to a territory or customer group, that undertaking acts in the knowledge that it will face little, if any, competition from the other undertaking.

## Legal assessment

### Undertakings

#### Key legal principles

- 3.8 For the purposes of the Chapter I prohibition and/or Article 101 TFEU, the term ‘undertaking’ covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.<sup>212</sup> An entity is engaged in ‘economic activity’ where it conducts any activity ‘... of an industrial or commercial nature by offering goods and services on the market ...’.<sup>213</sup>
- 3.9 The term ‘undertaking’ designates an economic unit, even if in law that unit consists of several natural or legal persons.<sup>214</sup>

#### Legal analysis

- 3.10 Ofcom has concluded that throughout the Relevant Period:
- a) Royal Mail (including PFW) was a provider of, among other things, postal and parcel delivery services,<sup>215</sup> and was therefore engaged in an economic activity and formed an undertaking for the purposes of the Chapter I prohibition and/or Article 101 TFEU; and

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<sup>209</sup> See *Glaxosmithkline PLC & Others v. Competition and Markets Authority*, paragraphs 83-84 [2018] CAT 4

<sup>210</sup> See *Toshiba Corporation v European Commission*, C-373/14; EU:C:2016:26, paragraph 28; *Solvay Solexis v Commission*, C-449/11 P, EU:C:2013:802, paragraph 82; and *YKK and Others v Commission*, C-408/12 P, EU:C:2014:2153, paragraph 26).

<sup>211</sup> See European Commission’s first report on Competition Policy (1971), paragraph 2, which notes: “Market-sharing agreements are particularly restrictive of competition and contrary to the achievement of a single market...The protection of their home market allows producers to pursue a commercial policy – particularly a pricing policy – in that market which is insulated from the competition of other parties to the agreement in other Member States, and which can sometimes only be maintained because they have no fear of competition from that direction”.

<sup>212</sup> *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

<sup>213</sup> *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

<sup>214</sup> *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

<sup>215</sup> See description in paragraphs 2.4-2.8.

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b) TSG was, among other things, a reseller of parcel delivery services,<sup>216</sup> and was therefore engaged in an economic activity and formed an undertaking for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

3.11 Given this, Ofcom concludes that Royal Mail (including PFW) and TSG constitute undertakings for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

## Agreement between undertakings

3.12 For the reasons set out below, Ofcom concludes that the Parties entered into an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU to share the Relevant Market through the allocation of customers.

## Agreement

### Key legal principles

3.13 The key question in establishing an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU is whether there has been “*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention*”.<sup>217</sup>

3.14 It has been held that: “*...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way...*”.<sup>218</sup> However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.<sup>219</sup>

3.15 An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral.<sup>220</sup>

3.16 Simple understandings<sup>221</sup> and ‘gentlemen’s agreements’ have been held to constitute agreements for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

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<sup>216</sup> See description in paragraphs 2.9-2.13.

<sup>217</sup> *Bayer AG v Commission*, T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in the judgment of the joined cases in *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96–97).

<sup>218</sup> *SA Hercules Chemicals NV v Commission*, T-7/89, EU:T:1991:75, paragraph 256.

<sup>219</sup> *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in the judgment of the joined cases etc in *GlaxoSmithKline Unlimited v Commission*, C-501/06P, EU:C:2009:610).

<sup>220</sup> *Hercules Chemicals v Commission* [1991], T-7/89, ECR II-1711, paragraphs 256 to 258. See also *Commission v Volkswagen AG* [2006], C-74/04 P, ECR I-6585, paragraph 37.

<sup>221</sup> *Re Stitching Sigarettindustrie Agreements* OJ [1982] L 232/1, [1982] 3 CMLR 702, paragraph 106 to 107; *National Panasonic* OJ [1982] L 354/28, [1983] 1 CMLR 497, where the Commission found an agreement rather than a concerted practice where there was no formal written agreement between Panasonic and its dealers - paragraph 43; *Viho/Toshiba* OJ [1991] L 287/39, [1992] 5 CMLR 180, where the offending clause had been removed in an amendment and yet the Commission still found there was an understanding between the parties – paragraph 22.

## Decision

- 3.17 The fact that a party does not act on, or subsequently implement, the agreement at all times does not preclude the finding that an agreement existed.<sup>222</sup> In addition, the fact that a party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.<sup>223</sup>

## Legal analysis

- 3.18 For the reasons set out in this section, Ofcom has concluded that, in all the circumstances, the Parties entered into an agreement to share the Relevant Market through the allocation of customers during the Relevant Period, for the purposes of the Chapter I prohibition and/or Article 101 TFEU.
- 3.19 As detailed above, in determining whether there has been an agreement, the key question is whether the Parties had a 'concurrence of wills', which demonstrated the faithful expression of the Parties' joint intention to allocate customers between them. The Parties' concurrence of wills when agreeing to the Customer Restriction is shown by the evidence set out in Section 2 and Annex 5, and in particular, the following:
- a) The Parties' internal documents during the Relevant Period, which demonstrate that each Party was aware of an agreement and/or rule existing between them that prohibited them from offering or supplying parcel delivery services to an existing customer of the other Party.<sup>224</sup>
  - b) Contemporaneous evidence of discussions between the Parties relating to the scope and operation of the Customer Restriction, which demonstrates their joint intention to conduct themselves on the Relevant Market in a specific way, namely through the allocation of customers.<sup>225</sup>
  - c) Contemporaneous documentary evidence, which demonstrates that the Parties actively monitored their own and each other's conduct to ensure that one Party did not offer or supply parcel delivery services to existing customers of the other Party during the Relevant Period.<sup>226</sup>

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<sup>222</sup> *Hasselblad v Commission*, C-86/82, EU:C:1984:65, paragraph 46; and *Sandoz prodotti farmaceutici SpA v Commission*, C-277/87, EU:C:1990:6, paragraph 3. See also *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraphs 61–63.

<sup>223</sup> *Dole v Commission*, T-588/08, EU:T:2013:130, paragraph 484.

<sup>224</sup> See paragraphs 2.33–2.36. See, in particular, the email dated 3 October 2013 from [Individual PFW6] (PFW) to various PFW employees (RMG0299), which noted: "Please ensure all the teams understand – do not deal with sale group – despatch bay [TSG] customers – even if the [sic] approach directly - we have a joint no poach agreement! which is firmly in place", and document entitled 'prospect-contacts-18-03-2016.csv' (TSG0230), attached to email dated 18 March 2016 from [Individual TSG3] (TSG) to [Individual TSG6] (TSG) (TSG0229), row 14,933, in which TSG noted: "... as we are currently working directly with Parcelforce, we are unable to approach and quote their customers as they are the same with us."

<sup>225</sup> See paragraphs 2.38–2.41. See, in particular, TSG's "Parcelforce Monthly Review- Minutes & Actions", dated 28 September 2015 (RMG0019), which noted "reassurances required that PF[W] will not discuss or set up our customers/ex customers required in writing by [PFW]".

<sup>226</sup> See paragraphs 2.37–2.43.

- d) Contemporaneous documentary evidence, which demonstrates the Customer Restriction was consistently enforced by both Parties during the Relevant Period, meaning that each of the Parties was, from time to time, prevented from offering parcel delivery services to prospective customers.<sup>227</sup>
- 3.20 Proof of implementation is not necessary for a finding that the Parties were party to an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU.<sup>228</sup> Nevertheless, in light of the evidence, Ofcom has concluded that the Parties did in fact implement a customer allocation agreement, as summarised below:
- a) The Parties contacted each other from time to time during the Relevant Period to specifically request the other Party to withdraw a quotation and/or ‘back away’ from a customer already being provided parcel delivery services by the other Party.<sup>229</sup>
- b) From time to time, both Parties refused to offer or supply parcel delivery services (or withdrew such offers if already made) to customers already being provided the same services by the other Party. This action was either apparently taken autonomously in recognition of the understanding between the Parties to allocate customers or, more frequently, upon request of the other Party.<sup>230</sup>
- 3.21 Ofcom notes that the Parties did not always consistently enforce the agreement to allocate customers during the Relevant Period.<sup>231</sup> However, we do not consider that such examples undermine or negate the fundamental nature of the agreement between the Parties. Furthermore, any inconsistencies in the Parties’ behaviour do not preclude a finding of an agreement as a matter of law.<sup>232</sup>
- 3.22 For the reasons described above, Ofcom has therefore found that there was an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU between the Parties that they would share the Relevant Market through the allocation of customers during the Relevant Period (the “Agreement”).

## Actual or potential competitors

- 3.23 This section sets out Ofcom’s conclusion that the Parties were actual (or at the very least potential) competitors in the Relevant Market.

### Key legal principles

- 3.24 The matter of whether the Parties were actual, or at least potential, competitors is a relevant consideration in this case.

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<sup>227</sup> See paragraphs 2.472.47-2.64.

<sup>228</sup> See case law cited in footnote 292.

<sup>229</sup> See paragraphs 2.39-2.41 and various examples within paragraphs 2.51-2.64.

<sup>230</sup> See paragraphs 2.47-2.64.

<sup>231</sup> See paragraphs 2.70-2.74.

<sup>232</sup> See paragraph 3.17.



## Decision

- 3.25 Two undertakings are treated as actual competitors if they are active on the same relevant market.<sup>233</sup>
- 3.26 In order to determine whether an undertaking is a potential competitor in the market, it must be determined whether ‘...if the agreement in question had not been concluded, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis but must be supported by factual evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy’.<sup>234</sup>
- 3.27 Market sharing represents a ‘strong indication that a competitive relationship existed’.<sup>235</sup>
- 3.28 In *Lundbeck*, the General Court held that the Commission was correct to assess whether the parties were potential competitors ‘at the time the agreements at issue were concluded’.<sup>236</sup>

## Legal analysis

- 3.29 Ofcom’s conclusion in paragraph 2.79 is that both Parties were active competitors in the Relevant Market throughout the Relevant Period. As described in Annex 3, Ofcom’s finding is that the geographic scope for the Relevant Market was UK-wide during the Relevant Period. As suppliers active on the same Relevant Market, we therefore find that the Parties were actual (or at the very least potential) competitors in that market. In support of this finding, Ofcom also relies on the evidence presented in paragraph 2.78.
- 3.30 In addition, Ofcom has found in paragraph 3.22 that the Parties had entered into an agreement that they would share the Relevant Market through the allocation of customers, which is a form of market sharing. The mere fact of a market sharing arrangement gives a strong indication that ‘a competitive relationship existed’ between TSG and PFW.<sup>237</sup>
- 3.31 Ofcom therefore concludes that the Parties were actual (or, at the very least, potential) competitors in the Relevant Market.

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<sup>233</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, paragraph 10.

<sup>234</sup> *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449, paragraph 100. See also *Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:91, paragraph 21; the joined cases of *European Night Services and others v Commission*, T- 374/94, T-375/94, T-384/94 and T-388/94, EU:T:1998:198, paragraph 137; *Visa Europe and Visa International Service v Commission*, T-461/07, EU:T:2011:181, paragraph 68; *E.ON Ruhrgas and E.ON v Commission*, T-360/09, EU:T:2012:332, paragraph 86.

<sup>235</sup> *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 33.

<sup>236</sup> *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449, paragraph 437.

<sup>237</sup> See paragraph 3.27 above.

## Object of preventing, restricting or distorting competition

3.32 This section explains why Ofcom has reached the conclusion that the Agreement had the object of preventing, restricting or distorting competition during the Relevant Period.

### Key legal principles

3.33 In the Chapter I prohibition and/or Article 101 TFEU, the term ‘object’ refers to the ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.<sup>238</sup> If an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove the agreement had, or would have, any actual anti-competitive effects to establish an infringement.<sup>239</sup>

3.34 An infringement by object can be regarded, by its very nature, as being harmful to the proper functioning of normal competition.<sup>240</sup> The ‘*essential legal criterion*’ for a finding of an anti-competitive object is that the coordination between undertakings ‘*reveals in itself a sufficient degree of harm to competition,*’ such that there is no need to examine its effects.<sup>241</sup>

3.35 To determine whether a restrictive agreement has a ‘sufficient degree of harm’, such as to constitute an infringement by object, the following must be considered:

- a) the content of its provisions;
- b) its objectives; and
- c) the economic and legal context of which it forms a part.<sup>242</sup>

3.36 When determining that context, ‘*it is also necessary to take into consideration the nature of the goods and services affected, as well as the real conditions of the functioning and structure of the market or markets in question.*’<sup>243</sup>

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<sup>238</sup> See e.g. respectively: *Consten & Grundig v Commission*, C-56/64, EU:C:1966:41, p.343 (‘...Since the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); the joined cases in *IAZ and Others v Commission*, 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraph 25; *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraphs 32-33.

<sup>239</sup> E.g. *T-Mobile Netherlands BV v NMa*, C-8/08, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, paragraph 269.

<sup>240</sup> *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; affirmed by *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26.

<sup>241</sup> *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26; *Commission v Stichting Administratiekantoor Portielje*, C 440/11 P, EU:C:2013:514, paragraphs 95 and 111; *ING Pensii v Consiliul Concurenței*, C-172/14, EU:C:2015:484, paragraph 32. See also *Ski Taxi v Norwegian Government*, E-03/16, an EFTA case, paragraphs 63 to 66.

<sup>242</sup> *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 27.

<sup>243</sup> *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and the case law cited therein.

## Decision

3.37 Although subjective intentions are not a necessary factor in determining object infringements, there is nothing to prevent Ofcom taking those into account.<sup>244</sup> It has also been established that an agreement with other legitimate objectives may still have an anti-competitive object.<sup>245</sup> In addition, the agreement does not need to have been successful, implemented, applied or enforced to find a restriction by object.<sup>246</sup>

### Market sharing

3.38 Sharing markets is expressly prohibited under s.2(2)(c) of the Act and Article 101(1)(c) TFEU.

3.39 Customer allocation restrictions have consistently been found to constitute a restriction of competition by object<sup>247</sup> that cannot be justified by an analysis of the economic context.<sup>248</sup> As such, *'in respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object'*.<sup>249</sup>

### Legal analysis

3.40 We describe in paragraphs 3.12-3.22 our finding that the Parties entered into the Agreement. We further consider that the Agreement operated at the downstream level of the supply chain and applied to the Parties' activity in the Relevant Market.<sup>250</sup>

3.41 Having considered its content and objectives, and when viewed in the legal and economic context in which it operated, Ofcom has found that the object of this agreement was to restrict competition. We consider that agreeing not to provide parcel delivery services to each other's customers was, by its very nature, harmful to the proper functioning of normal competition.

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<sup>244</sup> *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54; affirmed in *Dole Food and Dole Fresh Fruit Europe v Commission*, C- 286/13 P, EU:C:2015:184, paragraph 118.

<sup>245</sup> *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraph 21.

<sup>246</sup> See e.g. *Miller International v Commission*, C-19/77, EU:C:1978:19, paragraph 7; C-277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR 145, paragraph 3 of the Summary; C-551/03 P *General Motors v Commission* [2006] ECR I-3173 paragraphs 37, 61–62, 67–70 and C- 246/86 *Belasco v Commission* [1989] ECR 2117, paragraph 15. In its decision of 25 May 2016, Case AT.39792-*Steel Abrasives*, the Commission found that, 'The fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market' (paragraph 148, citing the judgment in *Groupe Danone v Commission*, T-38/02, EU:T:2005:367, paragraph 148). See also *ING Pensii v Consiliul Concurenței*, C-172/14, EU:C:2015:484, paragraphs 54–55.

<sup>247</sup> See Commission decision of 27 November 2002 in Case 37978 *Methylglucamine*, paragraphs 98 and 227; the judgment in *Commission v Stichting Administratiekantoor Portielje*, C-440/11P, EU:C:2013:514, paragraphs 95 and 111.

<sup>248</sup> *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 28. See also *Siemens AG and Others v Commission*, C-239/11, C-489/11 and C-498/11, EU:C:2013:866, paragraphs 218–219.

<sup>249</sup> *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 29. The Commission also made this observation in its submissions to the EFTA Court in the *Ski Taxi v Norwegian Government*, E-03/16, see paragraph 43 of the judgment. It is clear that this quote is not therefore only relevant to classic, covert cartels, but to any form of market sharing whether covert or non-covert, not least because the judgment does not distinguish between covert and non-covert cartels.

<sup>250</sup> See paragraphs 2.76-2.79. See further paragraph 3.53 onwards below.

3.42 This is further supported by evidence as to the subjective intentions of the Parties when the Agreement was implemented by the Parties, as set out below.

### Content of the Agreement

3.43 We find that the content of the Agreement supports a finding that the object of the Agreement was to prevent, restrict or distort competition. In reaching this conclusion, we note that the evidence set out in Section 2 above (and Annex 5 below) demonstrates that the Agreement, in practice, was for PFW and TSG to market share by not offering or supplying parcel delivery services to each other's customers.<sup>251</sup>

3.44 Whilst certain contemporaneous evidence suggests that there was a lack of consistent enforcement of specific aspects of the scope of the Customer Restriction or certain activities which fell out of scope,<sup>252</sup> we consider these examples do not detract from the Parties' clear understanding that the Agreement was designed to prevent the Parties from competing for each other's customers.<sup>253</sup>

### Objectives of the Agreement

3.45 We also find that the objectives of the Agreement support a finding that the object of the Agreement was to prevent, restrict or distort competition, as contemporaneous documentary evidence during the Relevant Period demonstrates that its primary objective was to share the Relevant Market by prohibiting the Parties from offering or supplying parcel delivery services to each other's customers.

3.46 For example, we have found that both Parties actively monitored<sup>254</sup> and enforced<sup>255</sup> compliance with the Agreement by identifying instances where one Party had offered to supply parcel delivery services to an existing customer of the other Party and taking steps to ensure the former did not provide parcel delivery services to that customer as a result.<sup>256</sup>

3.47 Furthermore, certain contemporaneous documentary evidence demonstrates that the Agreement had as its objective the restriction of competition between the Parties, and thus aimed to reduce the risks involved in competing freely in the market. For example:

- a) On 5 August 2013, [Individual TSG3] (TSG) emailed [Individual PFW8] (PFW) to query:  
*"During our last meeting you mentioned that the sales rep who quoted for [Customer 1's] business was going to return to the customer and increase their rates. Just*

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<sup>251</sup> See paragraphs 2.47-2.64.

<sup>252</sup> See paragraphs 2.70-2.74.

<sup>253</sup> See paragraphs 2.33-2.36.

<sup>254</sup> See paragraphs 2.37-2.43.

<sup>255</sup> See paragraphs 2.47-2.64.

<sup>256</sup> As set out in paragraphs 2.44-2.46, there is evidence that, on at least one occasion, TSG shared a list of its existing customers with PFW following a meeting between the Parties on 25 June 2015. Although there are internal PFW emails which suggest that the purpose of requesting a customer list from TSG was, at least in part, to enable the Parties to monitor the Customer Restriction, it is unclear from the evidence whether the list shared by TSG on 17 July 2015 was used for that purpose.

*wondered where we are with this as we are still struggling to win them back without really undercutting and losing margin.”<sup>257</sup>*

- b) On 7 August 2015, [Individual PFW8] (PFW) emailed [Individual TSG3] (TSG) to highlight: *“One of our telesales staff has been in talks with the customer below... they were contacted buy [sic] one of your sales guys who I am told undercut our prices...We would therefore like you to investigate this and withdraw your offer if you have made one.”<sup>258</sup>*
- c) An email sent from [Individual PFW8] (PFW) to [Individual TSG1] (TSG) on 26 July 2016 acknowledged that the agreement would prevent a customer from accessing lower prices for the same parcel delivery services: *“I am purely applying our agreement ie [sic] this customer is a PFW customer....by coming back via you they will be accessing the same service at cheaper prices (£[~~8~~]) than they had direct with us”.*<sup>259</sup>

3.48 These examples show that, absent the Agreement, the Parties would have competed against each other for such customers, and that retail pricing of parcel delivery services is at least one parameter on which the Parties would have competed.

3.49 The above examples also demonstrate that the Parties’ intention was for their activities in the Relevant Market to be constrained by the Agreement.<sup>260</sup> Whilst Ofcom is not required to demonstrate the Parties’ subjective intentions, it may nonetheless take them into account when considering a restriction by object. The evidence of subjective intention shown in these documents supports our finding that the Agreement had the object of preventing, restricting or distorting competition.

3.50 Ofcom has therefore concluded that the objective of the Agreement was to share the Relevant Market through the allocation of customers, thereby reducing competition between the Parties during the Relevant Period. Market sharing is, by its very nature, restrictive of competition and, in accordance with a well-established line of case law, usually found to have an anti-competitive object.<sup>261</sup>

## Context of the Agreement

3.51 In assessing whether the Agreement had the object of restricting competition, Ofcom has had regard to its actual context, including the services affected by the Agreement, the conditions of the functioning and structure of the market, and the relevant legal and economic context.

### *Affected services and functioning and structure of the market(s)*

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<sup>257</sup> Email dated 5 August 2013 (14:00) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0244).

<sup>258</sup> Email dated 7 August 2015 (11:58) from [Individual PFW8] (PFW) to [Individual TSG3] (TSG) (RMG0607).

<sup>259</sup> Email dated 26 July 2016 (11:54) from [Individual PFW8] (PFW) to [Individual TSG1] (TSG) (RM0675).

<sup>260</sup> See also paragraphs 2.33-2.36.

<sup>261</sup> See paragraph 3.39 above.

## Decision

- 3.52 As we set out in paragraph 2.78, the Parties are both active in the retail supply of express parcel delivery services. Ofcom has therefore concluded that the Agreement operated at this retail stage of the supply chain, where both Parties are active.<sup>262</sup>
- 3.53 In line with our finding that the Parties are both active at the same level of the supply chain, we have concluded that the Parties are actual (or at least potential) competitors in the Relevant Market.<sup>263</sup> As the Parties are actual (or at least potential) competitors, any type of customer allocation or market-sharing arrangement would be likely to restrict competition to some degree, as it would restrict their ability to freely approach, quote for and/or provide services to prospective customers in the Relevant Market.
- 3.54 Unlike the letters market, the parcels market is unregulated, growing and competitive.<sup>264</sup> There are various operators supplying parcel delivery services at the retail level, and evidence suggests that there is growing price competition between parcel operators.<sup>265</sup> The rise of third party intermediaries such as online resellers and consolidators has introduced additional players in the value chain, which may reduce the margin available on parcel delivery services by increasing price competition.<sup>266</sup>
- 3.55 We have also found that customers in the Relevant Market are price sensitive when shopping for parcel delivery services and, when given freedom of choice, are likely to switch between using parcel operators direct and resellers in order to obtain a better price. This is supported by evidence of actual substitution between PFW and TSG.<sup>267</sup>
- 3.56 We have found that the Agreement prevented the Parties from offering parcel delivery services to each other's customers. The Agreement therefore:
- a) prevented customers from being able to choose one Party over the other if they were already receiving parcel delivery services from one of them; and
  - b) reduced the Parties' customers' ability to shop around between and find the most competitively priced services in the Relevant Market.
- 3.57 The legal and economic context therefore supports our finding that, during the Relevant Period, the Parties chose to explicitly constrain competition between them by entering into the Agreement despite being actual (or at least potential competitors) in the Relevant Market.

### Conclusions on the object of preventing, restricting or distorting competition

- 3.58 In light of the above, Ofcom has found that the Agreement had the object of preventing, restricting or distorting competition by sharing the Relevant Market through the allocation of customers.

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<sup>262</sup> See paragraphs 2.78a) and A3.10.

<sup>263</sup> See paragraphs 3.29 to 3.31 and the evidence references therein.

<sup>264</sup> See paragraph 2.15 above.

<sup>265</sup> See paragraph 2.15 above.

<sup>266</sup> See paragraphs 2.16 to 2.20 above.

<sup>267</sup> See paragraph A3.14c) below.

## Decision

- 3.59 In assessing its content, objectives and legal and economic context, Ofcom has concluded that the Agreement revealed a sufficient degree of harm because, by its very nature, it was harmful to the proper functioning of normal competition. Consequently, it is not necessary to examine its effect.

## Duration

- 3.60 Ofcom has found that the Agreement was in place from at least 5 August 2013 to 25 May 2018 (which we defined as the “Relevant Period”). The earliest evidence we have observed of the Parties monitoring and/or enforcing the agreement is dated 5 August 2013<sup>268</sup>. We have found that the Agreement was in place until 25 May 2018, when the CMA issued a provisional marker to Royal Mail in response to its Leniency Application. We therefore conclude that the Infringement ceased on 25 May 2018.

## Appreciable restriction of competition

### Key legal principles

- 3.61 An agreement will fall within the Chapter I prohibition and/or Article 101 TFEU only if it has as its object or effect an appreciable prevention, restriction or distortion of competition.<sup>269</sup>
- 3.62 An agreement that may affect trade between Member States or within the UK or part of it, and that has an anti-competitive object, constitutes by its nature and independently of any actual or potential effects, an appreciable restriction on competition.<sup>270</sup>

### Legal analysis

- 3.63 Ofcom has found that the Agreement had the object of preventing, restricting or distorting competition (see paragraphs 3.40-3.59 above) and that it may have affected trade within the UK and/or between EU Member States (see paragraphs 3.64-3.73 below). Ofcom therefore also finds that the Agreement constitutes by its very nature an appreciable restriction of competition within the Relevant Market for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

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<sup>268</sup> Email dated 5 August 2013 (14:00) from [Individual TSG3] (TSG) to [Individual PFW10] (PFW) (RMG0244).

<sup>269</sup> An agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 and the case law cited therein. See also Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

<sup>270</sup> *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 37, which applies with the necessary changes in respect of the Chapter I prohibition in accordance with section 60(2) of the Act; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291, 30.8.2014, paragraphs 2 and 13: “For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object...the allocation of markets or customers”.

## Effect on trade within the UK and between Member States

### Effect on trade within the UK

#### Key legal principles

- 3.64 The Chapter I prohibition applies to agreements which may affect trade within the UK or part of it.<sup>271</sup> The effect on trade does not necessarily need to be ‘appreciable’.<sup>272</sup>
- 3.65 It is sufficient to establish that the agreement is capable of having such an effect; actual effects need not be shown.<sup>273</sup>

#### Legal analysis

- 3.66 Ofcom has found that the Agreement may have affected trade within the UK. The Agreement related to services within the Relevant Market, the scope of which we have found to extend to the whole of the UK (see paragraphs A3.23-A3.25).
- 3.67 In addition, Ofcom has concluded in paragraphs 3.32-3.59 above that the Agreement had the object of preventing, restricting or distorting competition by allocating customers, which means that by its very nature, it was capable of affecting trade.

### Effect on trade between Member States

#### Key legal principles

- 3.68 Article 101 TFEU is engaged where an agreement or concerted practice may affect trade between EU Member States to an appreciable extent.<sup>274</sup>
- 3.69 In order that trade may be affected by an agreement, ‘*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*’.<sup>275</sup>
- 3.70 The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various factors which, taken individually, may not be decisive.<sup>276</sup> These factors include the nature of the agreement, the nature of the products

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<sup>271</sup> Section 2(7) of the Act.

<sup>272</sup> *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, paragraphs 459–461.

<sup>273</sup> *Tate & Lyle plc and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 78.

<sup>274</sup> See paragraph 13 and case law cited in the Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C101, 27.4.2004 (the “Effect on Trade Guidelines”). NB. actual effects need not be shown (*Tate & Lyle plc and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 78).

<sup>275</sup> *Société Technique Minière v Maschinenbau Ulm GmbH*, Case 56/65, EU:C:1966:38, page 249.

<sup>276</sup> Effect on Trade Guidelines, paragraph 28, citing Case C-250/92 *Gottrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paragraph 54.



## Decision

covered by the agreement, the position and importance of the undertakings concerned and the economic and legal context of the agreement.<sup>277</sup>

- 3.71 The assessment of whether an agreement has an ‘appreciable’ effect on trade between Member States similarly depends on various factors and the circumstances of each case.<sup>278</sup> For example, the stronger the market position of the undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can be held to do so appreciably.<sup>279</sup>
- 3.72 In past cases, the Court of Justice has considered the appreciability requirement to be fulfilled when the sales of the undertakings concerned accounted for approximately 5% of the relevant market.<sup>280</sup> However, market share alone is not always the decisive factor. In particular, it is necessary also to take into account the turnover of the undertakings in the products concerned.<sup>281</sup>

## Legal analysis

- 3.73 Ofcom has found that the Agreement had the potential to affect trade between EU Member States to an appreciable extent. Ofcom has based this finding on the following:
- a) the Agreement had the object of preventing, restricting or distorting competition, which means that by its very nature, it was capable of affecting trade (as set out in paragraphs 3.40-3.59; and
  - b) the Agreement covered parcel delivery services within the Relevant Market, the scope of which we have found to extend to the whole of the UK (see paragraphs A3.23-A3.25).

## Exclusions and exemptions

### Exclusion under s.3(1) of the Act

- 3.74 The Chapter I prohibition and/or Article 101 TFEU does not apply if excluded under Schedules 1 to 3 of the Act (which concern mergers and concentrations, competition scrutiny under other enactments and general exclusions).
- 3.75 Ofcom has found that none of the relevant exclusions applies to the Agreement.

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<sup>277</sup> Effect on Trade Guidelines, paragraphs 28 and 32.

<sup>278</sup> Effect on Trade Guidelines, paragraph 45.

<sup>279</sup> Effect on Trade Guidelines, paragraph 45.

<sup>280</sup> Effect on Trade Guidelines, paragraph 46 citing Case 19/77 *Miller International Schallplatten GmbH v Commission*, EU:C:1978:19, paragraphs 9–10 and Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 58.

<sup>281</sup> Effect on Trade Guidelines, paragraph 46 citing joined cases 100/80 *SA Music Diffusion Française v Commission*, EU:C:1983:158, paragraph 86. See also Effect on Trade Guidelines, paragraph 48 to the effect that the sales of an undertaking in absolute terms may be sufficient to support a finding that the impact on trade is appreciable, particularly in the case of agreements that by their very nature are liable to affect inter-State trade.

### Individual exemption under section 9(1) of the Act

- 3.76 Agreements which satisfy the criteria in section 9 of the Act are exempt from the Chapter I prohibition and/or Article 101 TFEU. These cumulative criteria are as follows:
- a) the agreement contributes to improving production or distribution, or to promoting technical or economic progress;
  - b) while allowing consumers a fair share of the resulting benefit;
  - c) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
  - d) it does not afford the undertakings in question the possibility of eliminating competition in respect of a substantial part of the products in question.
- 3.77 In considering whether an agreement satisfies these cumulative criteria, Ofcom will have regard to the Commission's Article 101(3) Guidelines.<sup>282</sup>
- 3.78 Agreements which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from individual exemption since such restrictions usually fail to meet (at least) the first two conditions: they do not create economic benefits and they do not benefit consumers. In addition, market sharing can only be indispensable under exceptional circumstances.<sup>283</sup> However, each case must be assessed on the merits.
- 3.79 The burden of proving the benefit of individual exemption is on the party claiming the benefit (section 9(2) of the Act).<sup>284</sup> The Parties have not made any representations to Ofcom in this regard.
- 3.80 In light of the above, Ofcom has found that the Agreement is not exempt from the application of the Chapter I prohibition and/or Article 101 TFEU under section 9 of the Act.

### Block exemption under section 10 of the Act

- 3.81 Under section 10 of the Act, an agreement is exempt from the Chapter I prohibition and/or Article 101 TFEU if it does not affect trade between Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.
- 3.82 The burden of proving the applicability of the block exemption regulation is on the party claiming the benefit of it (by analogy to section 9(2) of the Act).<sup>285</sup>

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<sup>282</sup> Commission Notice Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97. Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

<sup>283</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Text with EEA relevance) 2011/C 11/01, paragraph 249. Similarly, the Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) 2004/C 101/08 state, at paragraph 79 that, "*The more restrictive the restraint the stricter the test under the third condition. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable*".

<sup>284</sup> See also *GlaxoSmithKline v Commission*, C-501/06 P, EU:C:2009:610, paragraphs 82–83.

<sup>285</sup> Commission Notice Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, paragraph 35.

## Decision

- 3.83 The Parties have not made any representations to Ofcom in this regard.
- 3.84 Ofcom has found that the Agreement does not benefit from a block exemption regulation and therefore that it is not exempt from the application of the Chapter I prohibition and/or Article 101 TFEU under section 10 of the Act.

## 4. Decision

### Ofcom's decision

- 4.1 For the reasons stated in this Decision, Ofcom has concluded that Royal Mail and TSG have infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a customer allocation agreement that had the object of preventing, restricting or distorting competition in the Relevant Market, and may have affected trade within the UK and between EU Member States (which we defined earlier as the "Infringement").
- 4.2 Ofcom has found that the duration of the Infringement was from 5 August 2013 to 25 May 2018.

### Directions

- 4.3 Section 32(1) of the Act provides that if Ofcom has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
- 4.4 The duration of Ofcom's infringement finding in the present case is from 5 August 2013 to 25 May 2018, when the CMA issued a provisional marker to Royal Mail in response to its Leniency Application. As set out above, on 17 August 2018, Royal Mail sent a letter to TSG seeking to formally terminate the operation of the Services Agreement<sup>286</sup> which TSG acknowledged on 21 August 2018.<sup>287</sup>
- 4.5 In the circumstances of this case, Ofcom considers that this action by Royal Mail effectively terminated the Agreement. In light of this, Ofcom considers that it is not necessary in the circumstances of this case to give directions to any of the Parties.

## Financial penalties

### Introduction

- 4.6 Ofcom may impose a financial penalty on parties to an agreement found to infringe the Chapter I prohibition and/or Article 101 TFEU, subject to the application of the relevant legal framework summarised below.
- 4.7 Ofcom considers that it would be appropriate in principle to impose financial penalties in this case, having regard to all the relevant factors and in particular due to the seriousness of the Infringement.

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<sup>286</sup> Letter dated 17 August 2018 from [Individual RMGL1] (Royal Mail Group Legal) to [Individual TSG2] (TSG) (TSG0065/RMG0187).

<sup>287</sup> Email dated 21 August 2018 (13:41) from [Individual TSG2] (TSG) to [Individual RMGL1] (RMGL) (TSG0111).

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- 4.8 Ofcom granted Royal Mail a leniency marker on 13 July 2018, in accordance with the CMA’s leniency policy.<sup>288</sup> Therefore, no financial penalty will be imposed on Royal Mail provided that it continues to cooperate with Ofcom and complies with the CMA’s leniency policy and the Leniency Agreement. Consequently, Ofcom has not calculated the level of any financial penalty that would be applied to Royal Mail if immunity had not been granted.
- 4.9 The remainder of this section therefore sets out Ofcom’s decision to impose a financial penalty on TSG for the Infringement.

## Legal framework

- 4.10 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, Ofcom may require an undertaking that is party to the agreement concerned to pay Ofcom a penalty in respect of the infringement. In accordance with section 38(8) of the Act, any such penalty must be calculated in accordance with the CMA’s published guidance in force at the time when setting the amount of the penalty (the “Penalties Guidance”)<sup>289</sup> and relevant legislation.<sup>290</sup>
- 4.11 Ofcom explained its reasons for imposing a financial penalty on TSG in the Statement of Objections issued to both Parties on 12 September 2019.

### Ofcom’s margin of appreciation in determining the appropriate penalty

- 4.12 Provided the penalties it imposes in a particular case are:
- a) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the ‘2000 Order’); and
  - b) Ofcom has had regard to the Penalties Guidance in accordance with section 38(8) of the Act,

Ofcom has a margin of appreciation when determining the appropriate amount of a penalty under the Act.<sup>291</sup> Ofcom is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>292</sup> Rather, Ofcom makes its assessment on a case-by-case basis<sup>293</sup> having regard to all relevant circumstances and the objectives of its policy

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<sup>288</sup> See:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)

<sup>289</sup> See: *CMA’s Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018) -

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/700576/final\\_guidance\\_penalties.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf)

<sup>290</sup> The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) and the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

<sup>291</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 168 and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at paragraph 102.

<sup>292</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 at paragraph 78.

<sup>293</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at paragraph 116 where the CAT noted that ‘other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent’. See also *Eden Brown and Others v OFT* [2011] CAT 8, at

on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, Ofcom will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).<sup>294</sup>

### Small agreements

- 4.13 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from the effect of section 36(1) of the Act (that is, penalties) for infringements of the Chapter I prohibition. A 'small agreement' is an agreement between undertakings, the combined applicable turnover of which does not exceed £20 million for the business year ending in the calendar year preceding one during which the infringement occurred; and which is not a price fixing agreement.<sup>295</sup>
- 4.14 The combined applicable turnover of the Parties exceeds £20 million.<sup>296</sup> Accordingly, Ofcom considers that the Parties do not benefit from immunity from financial penalties under section 39(3) of the Act for the Infringement.

### Intention/negligence

- 4.15 Ofcom may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the Infringement has been committed intentionally or negligently.<sup>297</sup> However, Ofcom is not obliged to specify whether it considers the Infringement to be intentional or merely negligent.<sup>298</sup>
- 4.16 The CAT has defined the terms 'intentionally' and 'negligently' as follows:
- "...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition".*<sup>299</sup>

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paragraph 97 where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.

<sup>294</sup> Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

<sup>295</sup> Section 39(1) of the Act and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to the Regulations.

<sup>296</sup> In the last reported financial year, PFW generated turnover of around £503 million (see Royal Mail's *Annual Report and Financial Statements 2017-18*, page 22) and TSG generated turnover of around £9.7 million (see TSG's *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2018* (TSG0270)).

<sup>297</sup> The Act, section 36(3).

<sup>298</sup> *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453–457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

<sup>299</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

- 4.17 This is consistent with the approach taken by the Court of Justice, which has confirmed that: *'the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.'*<sup>300</sup>
- 4.18 Given the above, the circumstances in which Ofcom might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition. For the reasons given at paragraphs 3.40-3.59 above, Ofcom considers that the Infringement had as its object the prevention, restriction or distortion of competition. Accordingly, Ofcom considers that the Infringement was committed intentionally.
- 4.19 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.<sup>301</sup>
- 4.20 Further, in the light of the evidence set out in Section 2 and Annex 5, Ofcom considers that TSG must have been aware, or could not have been unaware, of the anti-competitive nature of its conduct. At the very least, Ofcom considers that TSG ought to have known that the Customer Restriction would result in a restriction or distortion of competition.
- 4.21 For example, there is evidence that the Parties' intention in entering the Agreement was to reduce the risks in competing freely in the Relevant Market (see examples set out in paragraph 3.47).
- 4.22 Ofcom therefore finds that TSG committed the Infringement intentionally or, at the very least, negligently. Ofcom has therefore decided to impose a financial penalty on TSG for the Infringement (as detailed below).

### Calculation of TSG's financial penalty

- 4.23 As noted at paragraph 4.10 above, when setting the amount of a financial penalty, Ofcom must have regard to the guidance on penalties in force at that time. The Penalties Guidance sets out in detail a six-step approach for calculating the appropriate level of penalty. These steps are:
- a) **step one:** calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking;
  - b) **step two:** adjustment for duration;
  - c) **step three:** adjustment for aggravating or mitigating factors;
  - d) **step four:** adjustment for specific deterrence and proportionality;

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<sup>300</sup> C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 124.

<sup>301</sup> See: C-681/11 *Bundeswettbewerbshbehörde and Bundeskartellanwalt v Schenker & Co. AG and others*, EU:C:2013:404, paragraph 38.

e) **step five:** adjustment if the penalty exceeds the statutory maximum and to avoid double jeopardy; and

f) **step six:** adjustment for settlement discount.

4.24 Table 4.1 below sets out the financial penalty that Ofcom has imposed on TSG. The rest of this section explains how we have had regard to the Penalties Guidance in determining the level of financial penalty we have decided to impose.

**Table 4.1 – Penalty calculation**

Step	Adjustment	Penalty
Step one		
<b>Starting point</b>	24 per cent	
<b>Applied to relevant turnover</b>		£[X]
Step two		
<b>Adjustment for duration</b>	Multiply by 4.75	£[X]
Step three		
<b>Adjustment for aggravating or mitigating factors</b>	None	£[X]
Step four		
<b>Adjustment for specific deterrence and proportionality</b>		
<i>Adjustment for proportionality</i>	Reduction	£50,000
Step five		
<b>Adjustment to ensure that the statutory cap is not exceeded and to avoid double jeopardy</b>	None	£50,000
Step six		
<b>Adjustment for settlement</b>		
<i>Settlement discount</i>	Less 20 per cent	<b>£40,000</b>
Final penalty		<b>£40,000</b>

### Step 1: starting point

4.25 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.<sup>302</sup>

#### *Seriousness of the infringement*

4.26 Having regard to the Penalties Guidance, Ofcom's approach is to apply a starting point of up to 30 per cent of an undertaking's relevant turnover to reflect the seriousness of an

<sup>302</sup> Penalties Guidance, paragraphs 2.3-2.15.



## Decision

infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers) and the need for deterrence.<sup>303</sup>

4.27 This assessment is made on a case-by-case basis, taking account of all the circumstances of the case.<sup>304</sup> The Penalties Guidance states that a starting point between 21 and 30 per cent is generally used for the most serious infringements of competition law, including cartel activities such as market-sharing.<sup>305</sup>

4.28 In assessing the seriousness of the Infringement, Ofcom considers that the following factors point to a starting point within the 21-30 per cent range:

- a) the Infringement involved market-sharing, which is one of the most serious types of hardcore cartel activity; and
- b) the Infringement is likely to have affected competition by:
  - i) preventing the Parties from freely competing for customers in the Relevant Market on, amongst other things, price; and
  - ii) reducing the Parties' customers' ability to shop around and find the most competitively priced parcel delivery services in the Relevant Market.

4.29 Taking the above into account and having regard to the objectives to reflect the seriousness of the infringement and achieve deterrence, Ofcom has considered which starting point to select in the upper range.

4.30 Ofcom has decided that the starting point for the Infringement should be at the high (but not the highest) end of the range, noting that the actual impact on the Relevant Market and number of affected customers was relatively limited (confined only to customers who had engaged with both Parties at one point or another). Therefore, in the circumstances, Ofcom has decided to apply a starting point of 24 per cent of TSG's relevant turnover.

### *Relevant turnover*

4.31 The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.<sup>306</sup> The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.<sup>307</sup>

4.32 In this case, the 'last business year' of TSG is the financial year ending 31 March 2018. TSG's relevant turnover for the 2017-18 financial year is £[X].<sup>308</sup>

4.33 Applying 24 per cent to TSG's relevant turnover of £[X] results in a penalty of £[X] at step 1.

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<sup>303</sup> Penalties Guidance, paragraph 2.4.

<sup>304</sup> Penalties Guidance, paragraphs 2.5 and 2.8.

<sup>305</sup> Penalties Guidance, paragraph 2.6.

<sup>306</sup> Penalties Guidance, paragraph 2.11; S.3 The Competition Act 1998 (Determination of Turnover of Penalties) Order 2000

<sup>307</sup> Penalties Guidance, paragraph 2.11; S.3 The Competition Act 1998 (Determination of Turnover of Penalties) Order 2000

<sup>308</sup> TSG's response dated 28 January 2019 to Question 1 of Ofcom's 3<sup>rd</sup> Section 26 Information Request from Ofcom to TSG, dated 16 January 2019 (TSG0252) (TSG0265).

### Step 2: adjustment for duration

- 4.34 The Penalties Guidance sets out that the starting point at step 1 may be increased to take account of duration. For infringements that last for more than one year, the penalty may be multiplied to reflect the number of years of the infringement, with a part-year being rounded up to the nearest quarter year (although, in exceptional cases, a part-year may be rounded up the nearest full year).<sup>309</sup>
- 4.35 As set out in paragraphs 3.60, we have found that the Infringement began on 5 August 2013 and ended on 25 May 2018. The duration of the Infringement is therefore 4 years and 9 months.
- 4.36 As per the Penalties Guidance, this results in an increase to the starting point by a factor of 4.75. After applying this factor, this results in a penalty of £[~~8~~] at the end of step 2.

### Step 3: adjustment for aggravating or mitigating factors

- 4.37 The Penalties Guidance sets out the penalty at the end of step 2 may be adjusted by increasing it where there are aggravating factors or decreasing it where there are mitigating factors.<sup>310</sup>

#### *Aggravating factors*

- 4.38 We do not consider that it is necessary to adjust the penalty at this step to take account of any aggravating factors.

#### *Mitigating factors*

- 4.39 We do not consider that it is necessary to adjust the penalty at this step to take account of any mitigating factors. We have considered TSG's representations on this matter.<sup>311</sup>
- a) **Cooperation:** According to the Penalties Guidance, cooperation with Ofcom which enables the enforcement process to be concluded more effectively and/or quickly can be a mitigating factor.<sup>312</sup> We consider that TSG has cooperated in our investigation, including by agreeing to a streamlined administrative process. However, we do not consider it is appropriate to apply a reduction on this basis, as this type of cooperation is what we would generally expect from a party engaging in the settlement process such as TSG (who have ultimately benefitted from a discount to the penalty at step 6).
- b) **Severe duress or pressure:** TSG has argued that it was pressured by PFW to enter into the agreement.<sup>313</sup> Having considered the contemporaneous documents from the time that contractual negotiations were taking place, we consider that the evidence is unclear as to who instigated the Agreement.<sup>314</sup> Furthermore, we consider that the

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<sup>309</sup> Penalties Guidance, paragraph 2.16.

<sup>310</sup> Penalties Guidance, paragraphs 2.17-2.19.

<sup>311</sup> Letter from TSG's legal advisers to Ofcom dated 16 July 2019 (TSG0365).

<sup>312</sup> Penalties Guidance, paragraph 2.19.

<sup>313</sup> Letter from TSG's legal advisers to Ofcom dated 16 July 2019 (TSG0365).

<sup>314</sup> See paragraph 2.29.

evidence demonstrates that TSG was a willing participant who actively monitored and enforced the Agreement.<sup>315</sup>

- c) **Unaware that the agreement constituted an infringement:** The Penalties Guidance provides for a potential mitigating circumstances where there is “*genuine uncertainty on the part of the undertaking as to whether the agreement... constituted an infringement.*”<sup>316</sup> TSG has argued that [Individual TSG2] (TSG) was unaware that the Agreement constituted an infringement of competition law.<sup>317</sup> However, as discussed above, it is a well-established principle of EU and domestic competition law that a financial penalty may be imposed on a party regardless of whether it was aware or unaware (and ought to have been aware) that it was infringing competition law. We do not consider that TSG’s arguments, that [Individual TSG2] (TSG) was not aware that a market-sharing agreement such as the Agreement would constitute an infringement of competition law (with market-sharing objectively being one of the most serious types of hardcore cartel activity), warrant reducing the fine on the basis of “*genuine uncertainty on the part of the undertaking*”.

- 4.40 For the reasons set out above, we therefore do not consider it is appropriate to apply a mitigation reduction at step 3.

#### **Step 4: adjustment for specific deterrence and proportionality**

- 4.41 The Penalties Guidance sets out that, at step 4, an assessment should be made as to whether the overall penalty is appropriate in the round. In considering whether any adjustments should be made at this step for specific deterrence or proportionality, Ofcom will have regard to appropriate indicators of the size and financial position of the undertaking, as well as any other relevant circumstances of the case. In terms of relevant indicators, the Penalties Guidance lists total turnover, profitability (including profits after tax), net assets and dividends, liquidity and industry margins.<sup>318</sup>
- 4.42 The Penalties Guidance also states that “[w]here necessary, the penalty reached at the end of steps 1 to 3 may be decreased to ensure that the level of penalty is not disproportionate or excessive”.<sup>319</sup> This assessment should “*have regard to the undertaking’s size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking’s infringing activity on competition*”.<sup>320</sup>
- 4.43 Accordingly, in step 4, Ofcom has considered, in the round, whether imposing a penalty at the level indicated at the end of steps 1-3 would be appropriate to deter the infringing undertaking from breaching competition law and whether it would be either disproportionate or excessive.

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<sup>315</sup> See paragraphs 2.37-2.64.

<sup>316</sup> Penalties Guidance, paragraph 2.19.

<sup>317</sup> Letter from TSG’s legal advisers to Ofcom dated 16 July 2019 (TSG0365).

<sup>318</sup> Penalties Guidance, paragraph 2.20.

<sup>319</sup> Penalties Guidance, paragraph 2.24.

<sup>320</sup> Penalties Guidance, paragraph 2.24.

4.44 We have considered a range of TSG's financial indicators and consider that, in light of these, a significant downward adjustment from the penalty reached at the end of step 3 is appropriate to reflect its current financial position. Our analysis of TSG's financial indicators is summarised below:

- a) **Turnover - £[redacted] (2017/18 financial year):** TSG's total turnover of £[redacted] is large,<sup>321</sup> but we do not consider that this, by itself, is a complete indicator of its financial performance, because most of the money it collects from customers is passed to the customers' chosen postal operators to pay for their services, with TSG retaining a relatively small margin.
- b) **Profitability - average £[redacted] profit after tax per year in last three years:** TSG has been making low profits over the last three years.<sup>322</sup>
- c) **Retained earnings (£1,486k):** TSG has retained earnings of £1,486k as at March 2018.<sup>323</sup> However, it states these are mainly from profits made from historic business not related to this investigation.<sup>324</sup> Although we recognise that these sums may not relate principally to TSG's activities on the Relevant Market, they nonetheless are held by the undertaking and therefore we do place some weight on them and consider it appropriate to take them into account in our assessment.
- d) **Cash in bank (£[redacted]):** TSG had 'cash in bank' of £421k as at 31 March 2018.<sup>325</sup> This figure has reduced to £[redacted] as at April 2019, based on a bank statement provided to us.<sup>326</sup> Net assets, such as cash in bank, are relevant financial indicators and we have taken these monies into account when considering the level of penalty.
- e) **Distributions:** [Individual TSG2] (TSG) last received a dividend in 2015 (£[redacted]).<sup>327</sup> We have taken TSG's distributions into account as an indicator of its financial position.

4.45 Taking the above factors into account, we provisionally consider that the unadjusted penalty of £[redacted] would be disproportionate and should be significantly reduced (notwithstanding the fact that it is above the statutory maximum).

4.46 Given TSG's financial position and the points noted above, we consider that a downward adjustment to a penalty of £50,000 would be appropriate. We have decided that £50,000 would be sufficient to act as a deterrent to both TSG and others in the market without being disproportionate or excessive.

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<sup>321</sup> TSG, *Report of the Directors and Unaudited Financial Statement for the Year Ended 31 March 2018* (TSG0270).

<sup>322</sup> See: (i) TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2016* (TSG0268), which shows £[redacted]; (ii) TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2017* (TSG0269), which shows £[redacted]; and (iii) TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2018* (TSG0270), which shows £[redacted].

<sup>323</sup> TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2018* (TSG0270).

<sup>324</sup> TSG's response of 13 June 2019 to Ofcom's 5<sup>th</sup> Section 26 Information Request dated 5 June 2019 (TSG0342).

<sup>325</sup> TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2018* (TSG0270).

<sup>326</sup> TSG's bank statement for the period 4 March to 3 April 2019 (TSG0340).

<sup>327</sup> See: (i) details of the salary of [Individual TSG2] (TSG) for 2015-2019 (TSG0263/TSG0264); and (ii) TSG's response of 6 March 2019 to Ofcom's 4<sup>th</sup> Section 26 Information Request dated 15 February 2019 (TSG0321).

### Step 5: adjustment if the penalty exceeds the statutory maximum and to avoid double jeopardy

- 4.47 Section 36 of the Act provides that no penalty may exceed ten per cent of an undertaking's worldwide turnover in the last business year preceding the date on which the infringement decision is taken.
- 4.48 We have assessed the recommended penalty of £50,000 against this threshold. TSG's financial accounts for 2018-19 are not yet available.<sup>328</sup> However, we have considered its 2017-18 financial accounts. TSG's worldwide turnover for the 2017-18 financial year is £[§<]<sup>329</sup> and 10% of this is £[§<].
- 4.49 Our penalty of £50,000 does not therefore exceed the threshold based on the 2017-18 figures. As our penalty of £50,000 is so far below ten per cent of TSG's worldwide turnover for the 2017-18 financial year, we further consider it would be very unlikely that the threshold for the 2018-19 financial year would be exceeded. We therefore do not consider that the penalty of £50,000 is likely to exceed the statutory maximum.
- 4.50 Furthermore, we do not consider that any adjustment needs to be made to the level of the penalty to avoid double jeopardy. We therefore do not consider it necessary to make any adjustment at stage 5.

### Step 6: adjustment for settlement discount

- 4.51 Ofcom will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with Ofcom, which will involve, amongst other things, the undertaking admitting its participation in an infringement.<sup>330</sup> TSG informed Ofcom of its willingness to enter settlement discussions on 14 January 2019.
- 4.52 As TSG has agreed to settle the case and admitted to the Infringement, we have decided to apply a discount to the penalty to acknowledge TSG's settlement of the matter and cooperation in expediting the investigatory process.
- 4.53 As TSG informed Ofcom of its willingness to enter settlement discussions prior to the issuing of a Statement of Objections, it is eligible for a discount of up to 20%. In the circumstances, we consider that it is appropriate to apply the full 20% discount.
- 4.54 We therefore reach a penalty of £40,000 at the end of step 6.

### Final penalty amount

- 4.55 Having had regard to the Penalties Guidance and given the above, Ofcom has imposed a financial penalty of £40,000 on TSG.

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<sup>328</sup> Email from [Individual TSG2] (TSG) to [Individual Ofcom1] (Ofcom) dated 13 May 2019 (TSG0332).

<sup>329</sup> TSG, *Report of the Directors and Unaudited Financial Statements for the Year Ended 31 March 2018* (TSG0270).

<sup>330</sup> Penalties Guidance, paragraph 2.30.

Decision

Signed by:

A handwritten signature in black ink, consisting of a stylized 'G' followed by a horizontal line that tapers to the right.

**Gaucho Rasmussen**

**Enforcement Director**

**For and on behalf of Ofcom**

**14 November 2019**

## List of annexes

**Annex 1:** Glossary of terms

**Annex 2:** Ofcom's investigation

**Annex 3:** Market definition

**Annex 4:** Relevant individuals

**Annex 5:** Supplementary evidence: relevant customer interactions

## A1. Glossary of terms

A1.1 In this Decision:

- a) the “**Act**” means the Competition Act 1998;
- b) the “**Agreement**” means the customer allocation agreement Ofcom has found to have existed between the Parties, for the purposes of the Chapter I prohibition and/or Article 101 TFEU;
- c) the “**CAT**” means the Competition Appeal Tribunal;
- d) the “**Chapter I prohibition**” means the prohibition set out in Section 2 of the Act, which prohibits agreements between undertakings which may affect trade within the whole or part of the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an exclusion applies or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act;
- e) the “**CMA**” means the Competition and Markets Authority;
- f) the “**Customer Restriction**” means the understanding between the Parties that they would not offer or supply parcel delivery services to each other’s customers at the retail level, on both an active or passive basis;
- g) “**Despatch Bay**” means the trading name of TSG;
- h) the “**Infringement**” means Ofcom’s finding that the Parties have infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a customer allocation agreement that had the object of preventing, restricting or distorting competition in the Relevant Market during the Relevant Period;
- i) the “**Leniency Agreement**” means the leniency agreement between Ofcom and Royal Mail dated 10 September 2019;
- j) “**Ofcom**” means the Office of Communications, as established by section 1(1) of the Office of Communications Act 2002;
- k) “**PFW**” means Parcelforce Worldwide, the parcel division of Royal Mail;
- l) the “**Parties**” means both PFW and TSG;
- m) the “**Party**” means either PFW or TSG;
- n) the “**Relevant Market**” means the market for the retail supply of express parcel delivery services to business customers based in the UK;
- o) the “**Relevant Period**” means 5 August 2013 to 25 May 2018;
- p) “**Royal Mail**” means Royal Mail Group Limited (company no. 08680755);



## Decision

- q) “**Services Agreement**” means the Parcelforce Worldwide Corporate Services Agreement, version 2, dated 8 September 2011 between Royal Mail Group Limited (trading as Parcelforce Worldwide) and Come Shopping.com (trading as Despatch Bay), attached to an email dated 21 September 2011 from [Individual PFW4] (PFW) to [Individual TSG2] (TSG);
- r) “**TFEU**” means the Treaty on the Functioning of the European Union; and
- s) “**TSG**” means The Salegroup Limited trading as despatchbay.com (company no. 03949786).

## A2. Ofcom's investigation

A2.1 This Annex sets out the origin of this investigation and provides an overview of the investigatory steps taken to date.

### Royal Mail's leniency application

A2.2 This investigation originated from an application for leniency by Royal Mail (including its business unit, PFW) on 24 May 2018 (the "Leniency Application"). Royal Mail was granted a provisional type A immunity marker under the CMA's leniency policy on 25 May 2018 in relation to a suspected market sharing and/or customer allocation arrangement with TSG for the provision of parcel services to business customers in the UK from 2011 to date.

A2.3 The CMA and Ofcom have concurrent competition powers in relation to activities connected to electronic communications, broadcasting and postal services matters. The Leniency Application related to matters connected to the provision of postal services in the UK. Accordingly, the Leniency Application was shared with Ofcom by the CMA on 13 June 2018<sup>331</sup>.

A2.4 The CMA subsequently confirmed that agreement had been reached that Ofcom was the competent person who should exercise prescribed functions under the Act in relation to this matter. Ofcom was therefore allocated the case in accordance with the Concurrency Regulations and considered the contents of the Leniency Application.

A2.5 On 13 July 2018, Ofcom confirmed Royal Mail's Type A immunity marker and the conditions for its immunity. Royal Mail subsequently entered into the Leniency Agreement with Ofcom, in accordance with the CMA's leniency policy, on 10 September 2019 in relation to its involvement in the Infringement.

### Ofcom's investigation

A2.6 In July 2018, Ofcom determined there were reasonable grounds to suspect that Royal Mail (including PFW) and TSG had engaged in conduct that may infringe Chapter I of the Act and/or Article 101 of the TFEU, as required under section 25 of the Act. Ofcom consequently opened its formal investigation under the Act on 13 August 2018.<sup>332</sup>

A2.7 On 13 August 2018, Ofcom requested documents and information from TSG under section 26 of the Act<sup>333</sup> and from Royal Mail on a voluntary basis (in accordance with the CMA's leniency policy).<sup>334</sup> Ofcom requested further information and/or documents under section

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<sup>331</sup> Pursuant to the Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers (2 February 2016), regulation 3 of The Competition Act 1998 (Concurrency) Regulations 2014 and the information-sharing gateways of sections 241(1) and 241(3) of the Enterprise Act 2002.

<sup>332</sup> See: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01222](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01222)

<sup>333</sup> Letter and 1<sup>st</sup> Section 26 Information Request from Ofcom to TSG, dated 13 August 2018 (TSG0002).

<sup>334</sup> Letter and Voluntary Information Request from Ofcom to Royal Mail, dated 13 August 2018 (RMG0181).

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26 of the Act from TSG on 12 October 2018<sup>335</sup>, 16 January 2019,<sup>336</sup> 15 February 2019<sup>337</sup> and 5 June 2019.<sup>338</sup>

- A2.8 During the investigation, Ofcom held State of Play meetings with Royal Mail on 19 July 2018 and 13 December 2018. Ofcom held State of Play meetings with TSG on 22 August 2018 and 12 December 2018.

## Draft Statement of Objections

- A2.9 On 14 January 2019, TSG indicated to Ofcom that it was willing to enter into settlement discussions.
- A2.10 In accordance with Ofcom's settlement policy, on 21 June 2019, Ofcom provided TSG with a draft Statement of Objections<sup>339</sup> together with access to the documents referred to in the draft Statement of Objections and a list of the documents on Ofcom's file. On 19 July 2019, TSG submitted written representations on the draft Statement of Objections,<sup>340</sup> consistent with Ofcom's Enforcement Guidelines.
- A2.11 At the same time, a copy of the draft Statement of Objections was also provided to Royal Mail. On 5 July 2019, Royal Mail made limited representations<sup>341</sup> on the draft Statement of Objections, consistent with the conditions for leniency under the CMA's leniency policy.

## Statement of Objections

- 4.56 On 12 September 2019, Ofcom issued its Statement of Objections to both Parties together with access to the documents referred to in the Statement of Objections and a list of the documents on Ofcom's file.
- 4.57 On 16 September 2019, TSG sent Ofcom a letter in response to the Statement of Objections confirming it voluntarily, clearly and unequivocally admitted to the Infringement and agreed to pay the proposed penalty of £40,000.<sup>342</sup>
- 4.58 On 26 September 2019, Royal Mail made representations to Ofcom limited to manifest factual inaccuracies in the Statement of Objections,<sup>343</sup> consistent with the conditions for leniency under the CMA's leniency policy and the Leniency Agreement.<sup>344</sup>

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<sup>335</sup> Letter and 2<sup>nd</sup> Section 26 Information Request from Ofcom to TSG, dated 12 October 2018 (TSG0133).

<sup>336</sup> Letter and 3<sup>rd</sup> Section 26 Information Request from Ofcom to TSG, dated 16 January 2019 (TSG0252).

<sup>337</sup> Letter and 4<sup>th</sup> Section 26 Information Request from Ofcom to TSG, dated 15 February 2019 (TSG0292).

<sup>338</sup> Letter and 5<sup>th</sup> Section 26 Information Request from Ofcom to TSG, dated 5 June 2019 (TSG0337).

<sup>339</sup> Under paragraph 5.20 of Ofcom's *Enforcement guidelines for Competition Act investigations* (28 June 2017) (and paragraph 14.14 of the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)), a business wishing to explore settlement will be presented with a statement of facts setting out Ofcom's provisional findings and the evidence on which we rely. In the present case, as a draft Statement of Objections was already in preparation, TSG was provided with the draft Statement of Objections.

<sup>340</sup> Letter from TSG's legal advisers to Ofcom dated 16 July 2019 (TSG0365).

<sup>341</sup> Letter from Royal Mail's legal advisers to Ofcom dated 5 July 2019 (RMG0873).

<sup>342</sup> Letter from TSG to Ofcom dated 16 September 2019 (TSG0398).

<sup>343</sup> See: (1) Letter from Addleshaw Goddard to Ofcom dated 26 September 2019 (RMG0914).

<sup>344</sup> See paragraphs 5.9 – 5.11 of the CMA leniency guidance.

## A3. Market definition

### Introduction

- A3.1 When applying the Chapter I prohibition, Ofcom is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement and/or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>345</sup> The Competition Appeal Tribunal (“CAT”) has stated that, in Chapter I cases, the *‘determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement’*.<sup>346</sup>
- A3.2 In the present case, a view on the relevant market is relevant to establishing whether the Parties are actual or potential competitors. As such, Ofcom has referred to the relevant market in paragraphs 3.23-3.31 above. Furthermore, we have formed a view of the relevant market in order to calculate each of the Parties’ ‘relevant turnover’ in the market affected by the Infringement, as this is required for the purposes of establishing the level of the financial penalty that Ofcom has decided to impose on TSG.<sup>347</sup>
- A3.3 To that effect, Ofcom must be *‘satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement’*.<sup>348</sup> The Court of Appeal has made clear that the relevant market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.<sup>349</sup>
- A3.4 The market definition reached in this case should therefore be viewed in context, and in light of its purposes as outlined above, and is not determinative for the purposes of any future cases.

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<sup>345</sup> *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230; judgment in *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74.

<sup>346</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 176. See Also: *Market definition* (OFT403, December 2004), adopted by the CMA Board, footnote 6: *‘[a]n exception is where agreements have as their object the prevention, restriction or distortion of competition. In these cases, market definition is not necessarily a prerequisite for finding an infringement: see Case T-62/98 Volkswagen AG v Commission [2000] ECR II-2707 at paragraphs 230 to 232’*.

<sup>347</sup> See Section 4, which discusses Ofcom’s decision.

<sup>348</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

<sup>349</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173.

## Assessment of the relevant market

- A3.5 There are two main dimensions to the definition of the relevant market:<sup>350</sup>
- a) **the product market:** a relevant product market comprises all those goods and/or services which are regarded as interchangeable by any reason of the products' characteristics, prices and intended use,<sup>351</sup> or, in other words, all those products which are "close enough" substitutes for them sensibly to be regarded as being in the same market;<sup>352</sup> and
  - b) **the geographic market:** a relevant geographic market is the geographic area in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different.<sup>353</sup>
- A3.6 Ofcom is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand<sup>354</sup> as well as the applicable legal framework.
- A3.7 For the reasons given below, Ofcom has found that the relevant market is the **retail supply of express parcel delivery services to business customers based in the UK.**

### The relevant product market

#### *The focal product*

- A3.8 For the purposes of defining the relevant product market, Ofcom starts by identifying the products or services which are the subject of the investigation i.e. those which are affected by the Infringement (the 'focal product(s)').<sup>355</sup> It then considers the competitive pressure faced by companies active in the market, by:
- a) establishing the closest substitutes to the focal product(s); and
  - b) considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.<sup>356</sup>

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<sup>350</sup> *Market definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraph 2.15.

<sup>351</sup> Commission Notice on Market Definition, paragraph 7.

<sup>352</sup> OFT403, *Market Definition*, paragraph 2.5.

<sup>353</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ C 372/5, paragraph 8.

<sup>354</sup> OFT403, paragraph 5.7 and footnote 5.

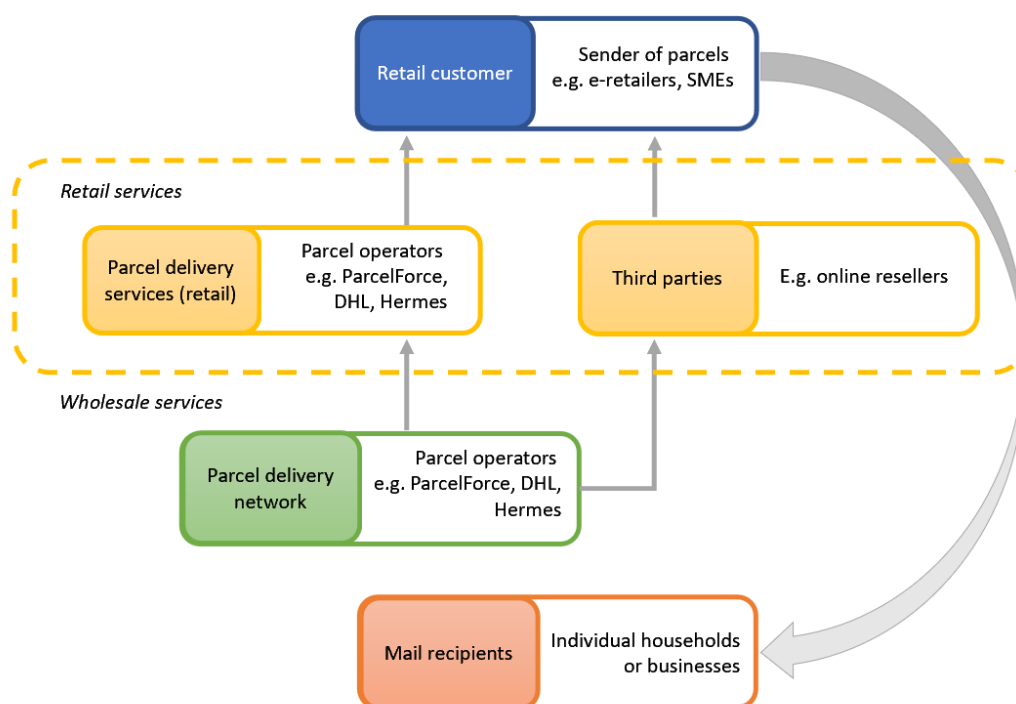
<sup>355</sup> OFT403, paragraph 3.2.

<sup>356</sup> *Market definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraphs 2.9 to 2.10. The Guidelines note that where there is more than one product under investigation, the test will usually be applied separately for each of the products (footnote 11).

A3.9 In accordance with PFW’s General Conditions of Carriage,<sup>357</sup> and as set out in the Services Agreement,<sup>358</sup> PFW agreed to provide its parcel delivery services to TSG’s customers. TSG resells PFW’s services to end customers,<sup>359</sup> principally mid-size commercial customers and SMEs (i.e. business customers rather than end consumers).<sup>360</sup> Therefore, in some respects, the Parties operate at different levels on the value chain.<sup>361</sup>

A3.10 However, they both also operate on the retail level in supplying customers with parcel delivery services. PFW is a direct provider of parcel delivery services and provides the physical collection and delivery of parcels from senders to recipients.<sup>362</sup> In contrast, TSG is a reseller of a variety of parcel operators’ services (including PFW) and, as such, does not physically collect or deliver any parcels. Customers can buy parcel delivery services from TSG, who then arrange the delivery service from the direct service provider, in much the same way that they can buy such services directly from PFW.<sup>363</sup> It is not unusual for undertakings to be active at more than one level of the supply chain such that a supplier and customer both compete on the downstream market.

**Figure 1 – Diagram of supply chain**



<sup>357</sup> Available at <https://www.parcelforce.com/conditions-of-carriage> (as amended from time to time).

<sup>358</sup> As noted at paragraph **Error! Reference source not found.**, we do not have any conclusive evidence to show that the Services Agreement was signed and/or formally entered into by the Parties, but consider it is relevant to demonstrate the nature and parameters of the intended commercial relationship.

<sup>359</sup> Excluding PFW’s 24 Large service.

<sup>360</sup> See paragraph 2.11 above.

<sup>361</sup> See paragraphs 2.18 and 2.19 above.

<sup>362</sup> See paragraph 2.18 above.

<sup>363</sup> See paragraph 2.19 above.

## Decision

- A3.11 We have found<sup>364</sup> that the Agreement prohibited the Parties from offering and supplying parcel delivery services to each other's customers at the retail level. Ofcom therefore considers that the Infringement related to this stage of the supply chain.
- A3.12 As such, Ofcom considers that the appropriate focal product is the **retail supply of express parcel delivery services** (referred to in the remainder of this section as 'parcel delivery services'). This has the following characteristics:
- a) It relates to services provided at the **retail level** with the services sold to business customers encompassing **end-to-end delivery** for B2B or B2C parcels (i.e. the sale of upstream services which include the collection, sortation and delivery of the parcel to the recipient (whether business or consumer)).
  - b) It includes addressed **packages and parcels** up to a weight of 30kg per individual parcel. This Decision does not cover letters or large letters.
  - c) Delivery is on an '**express**' basis, meaning either guaranteed same day, next day, 24-hour and/or 48-hour delivery, covering both national or international delivery addresses, rather than longer 'deferred' delivery services.

### *Narrower segmentation of parcel delivery services: direct supply versus resale channels*

- A3.13 As well as providing upstream parcel delivery services to resellers such as TSG, PFW also sells parcel delivery services directly to customers at the retail level. We therefore considered whether the relevant product market should be segmented to reflect the different business models of suppliers or whether they are part of a single retail market. In particular, we have considered whether the resale of parcel delivery services by third party intermediaries is substitutable for direct supply of parcel delivery services.
- A3.14 From the perspective of demand-side substitutability at the retail level, we consider that the resale of parcel delivery services does not constitute a separate product market to the direct supply of parcel delivery services i.e. there is a single retail market for parcel delivery services. In reaching this conclusion, we note the following:
- a) *The customer purchases an identical service from each type of provider:* From the end-customer perspective, resellers compete directly with the parcel delivery operator at the retail level, as the basic service provided is identical (i.e. parcel delivery services).<sup>365</sup>

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<sup>364</sup> See Section 3.

<sup>365</sup> See Fedex/TNT paragraph 49. We note in this regard that TSG's website notes that it offers "shipping services" and its parcels services notes "We work with Parcelforce, Yodel and DHL to delivery to to [sic] every address in the UK, and over 220 destinations worldwide". See also TSG's response of 10 September 2018 to Question 1(c) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0030), which sets out a full list of services offered to its customers, including PFW delivery services.

## Decision

- b) *Ancillary services do not affect the core service provided*: Resellers such as TSG may offer a number of ancillary, 'value-add' services to their customers, such as labelling, billing and customer services.<sup>366</sup> Whilst resellers may offer some ancillary software-based services, the main services offered (parcel delivery) are identical, and we consider that such ancillary services are used by resellers to differentiate themselves from direct suppliers (such as offering a one-stop shop for billing when sending parcels via multiple different operators) and would not undermine substitutability for the core services i.e. parcel delivery, for the majority of customers.
- c) *End-customers are price sensitive and likely to switch between using parcel operators direct and resellers*: End-customers, particularly SMEs or consumers, are likely to be sensitive to price and may look around for better deals for parcel delivery services.<sup>367</sup> Resellers base their business model on their ability to offer the same parcel delivery services as parcel delivery operators, but at lower prices.<sup>368</sup> As such, they are likely to act as a competitive constraint on each other's prices.<sup>369</sup>

A3.15 The above considerations are supported by evidence of actual substitution between PFW and TSG (on those occasions where the Customer Restriction was not enforced). For example:

- a) contemporaneous documentary evidence obtained during the investigation demonstrates that PFW and TSG compete to offer parcel delivery services to the same end customers;<sup>370</sup>
- b) there are a number of customer reviews on review websites such as Trustpilot.com that describe customers switching between PFW (or other parcel delivery operators) and TSG;<sup>371</sup> and

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<sup>366</sup> TSG notes that: "*Despatch Bay handles all elements of the carrier relationship for our clients. We enable the client to use multiple carriers and services whilst offering a centralised, very accurate and efficient one stop shop for billing, invoicing, claims, customer services etc*" (TSG's response of 10 September 2018 to Question 1(a) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027)).

<sup>367</sup> Recent reviews posted on [www.trustpilot.com](http://www.trustpilot.com) in relation to Despatch Bay's services emphasise the importance of competitive pricing to end-customers. See for example, review dated 26 October 2018 that notes: "*As a retailer in competitive marketplaces, meeting customer expectations each day, and doing so affordably, is essential. Our ongoing relationship with Despatch Bay makes this possible.*" (TP011) and review dated 9 May 2018 that notes: "*Easy booking process, saves me money on my old courier*" (TP009).

<sup>368</sup> Despatch Bay notes that it generates income by "*selling the actual parcel services to the end user with a margin across our cost price from the carrier. These rates are all volume and incidence driven, in that the more volume in and out of single points the lower the rates are*" (TSG's response of 10 September 2018 to Question 1(a) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027)). Similarly, Royal Mail notes that "*Online resellers act as a form of broker, agreeing discounted rates with the parcel operator and then onward selling the services to the end-customer – albeit that the parcel operator provides the underlying service*" (Royal Mail's Description of parties and background to the parcels sector, paragraph 2.5 (RMG0778)).

<sup>369</sup> Despatch Bay notes that "*once a client reaches a certain size the carriers like to deal directly with them and have often relieved us of hard earned business by simply beating the prices we can offer for their service*" (TSG's response of 10 September 2018 to Question 1(a) of Ofcom's 1<sup>st</sup> Section 26 Information Request dated 13 August 2018 (TSG0027)).

<sup>370</sup> See paragraph 2.78 above and Annex 5.

<sup>371</sup> See, for example, review dated 7 September 2018: "*We have been with Despatch Bay for two months now and are so far extremely happy with the service and do not regret switching from another courier that we were using for over three*



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- c) contemporaneous documentary evidence obtained during the Investigation demonstrate customers using TSG and PFW interchangeably or switching (or attempting to switch) between the Parties.<sup>372</sup>

### *Narrower segmentation of parcel delivery services: product type*

- A3.16 The focal product covers several types of parcel delivery service, e.g. speed of delivery (i.e. same day/next day/24-hour/48-hour) or delivery destination (i.e. domestic or international), albeit all ‘express’. We have therefore considered whether the relevant product market should be defined more narrowly than express parcel delivery services. We note that previous decisions by the OFT/CMA and the European Commission have segmented the upstream markets for parcel delivery services into narrower product categories.<sup>373</sup>
- A3.17 However, Ofcom notes that the Customer Restriction applied to all but one<sup>374</sup> of PFW and TSG’s retail services for parcel delivery services, meaning that virtually the entire range of parcel delivery services are ‘affected’ for the purposes of determining relevant turnover for the purposes of calculating any applicable financial penalty. It would therefore make no material difference to Ofcom’s calculation of relevant turnover whether it separates out the above categories into individual product markets or aggregates the turnover in each category.
- A3.18 Similarly, disaggregating the relevant product market would make no difference to Ofcom’s analysis of whether the Parties are actual or potential competitors, as TSG offers its customers virtually the full range of PFW’s parcel delivery services.<sup>375</sup> Therefore, for the purposes of this Decision, Ofcom is not making any formal finding as to the existence of narrower product markets.

### *Broader product market*

- A3.19 We have also considered whether the relevant product market may be wider than parcel delivery services, i.e. in particular, whether the services below could act as substitutes for customers currently using express parcel delivery services:
- a) letters/large letter delivery services; and
  - b) deferred (standard) delivery services.
- A3.20 We do not consider that there are any direct demand-side substitutes for express parcel delivery services, noting that:

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years” (TP008); review dated 26 February 2018: “I think they [Despatch Bay] provide a great service in helping me beat Parcel Force’s extortionate prices [...]” (TP005).

<sup>372</sup> See paragraph 2.78e) for further detail.

<sup>373</sup> See for example the subsegments discussed in the European Commission’s decision in case M.7630 - FEDEX / TNT EXPRESS and the summary of previous decisional practice therein.

<sup>374</sup> PFW’s 24 Large service.

<sup>375</sup> Excluding PFW’s 24 Large service.

## Decision

- a) delivery prices are categorised according to size and weight, meaning that letter delivery services cannot be a substitute for parcel delivery services, which will exceed the size and weight limited for letters/large letters; and
- b) deferred delivery services are unlikely to act as a competitive constraint on express services (i.e. guaranteed delivery within, for example, 48 hours), as many customers will attach great importance to the certainty that a parcel will be delivered within a specific timeframe and are generally willing to pay a higher price for that service.

A3.21 In any case, for the purposes of identifying ‘relevant turnover’, widening the market further would not affect our analysis, as any additional services supplied by TSG and/or PFW are not affected by the Infringement.

## Conclusion

A3.22 On the basis of the reasoning set out above, Ofcom concludes that the relevant product market for the purposes of this investigation is the retail supply of express parcel delivery services to business customers.

## The relevant geographic market

A3.23 While formal definition of the market is not necessary for the purposes of this Decision, the evidence in Ofcom’s possession suggests that, in the context of this case, the geographic scope of the market is not likely to be narrower than national. We note in particular:

- a) parcel delivery services are offered by TSG and PFW to business customers based throughout the UK;
- b) the major parcel operators operating in the UK offer a UK-wide delivery service, offering delivery to addresses throughout the UK (and internationally); and
- c) the Infringement covered the supply of parcel delivery services across the whole of the UK.

A3.24 We have considered whether the relevant geographic market may be wider than national. However, we note that domestic parcels make up the majority of parcel volumes (81%) and revenues (63%) in the UK parcels market.<sup>376</sup> In addition, national postal operators are the strongest operators within their domestic networks and generally have the biggest market shares, suggesting that competitive conditions have strong national characteristics.<sup>377</sup>

A3.25 In the light of the above considerations, we conclude that the appropriate geographic market for the purposes of this investigation is national.

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<sup>376</sup> See Ofcom’s Annual monitoring update on the postal market for financial year 2017-18, available at [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0027/128268/Annual-monitoring-update-postal-market-2017-18.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0027/128268/Annual-monitoring-update-postal-market-2017-18.pdf), paragraph 4.9.

<sup>377</sup> For example, Royal Mail Group, including PFW, remains the company with the highest market share in UK parcels delivery, of approximately 53% by volume (Royal Mail Annual Report and Financial Statements 2017-18, page 7, available at: <https://www.royalmailgroup.com/media/10169/royal-mail-group-annual-report-and-accounts-2017-18.pdf>).

## Conclusions on the relevant market

A3.26 We have found that, for the purposes of this Investigation, the relevant market is the retail supply of express parcel delivery services to business customers based in the UK.

## A4. Relevant individuals

A4.1 Tables 1 and 2 below sets out the principal employees of PFW and TSG referred to in this Decision. The employees' names and roles are listed to facilitate an understanding of the evidence.

**Table 1: Key PFW employees**

Name	Role
[Individual PFW1]	[X]
[Individual PFW2]	[X]
[Individual PFW3]	[X]
[Individual PFW4]	[X]
[Individual PFW5]	[X]
[Individual PFW6]	[X]
[Individual PFW7]	[X]
[Individual PFW8]	[X]
[Individual PFW9]	[X]
[Individual PFW10]	[X]

**Table 2: Key TSG employees**

Name	Role
[Individual TSG1]	[X]
[Individual TSG2]	[X]
[Individual TSG3]	[X]
[Individual TSG4]	[X]
[Individual TSG5]	[X]

## A5. Supplementary evidence: relevant customer interactions

This Annex contains a table setting out details of the Parties' interactions relating to the Customer Restriction for 90 individual customers between 5 August 2013 and 24 April 2018. This has been redacted in full.