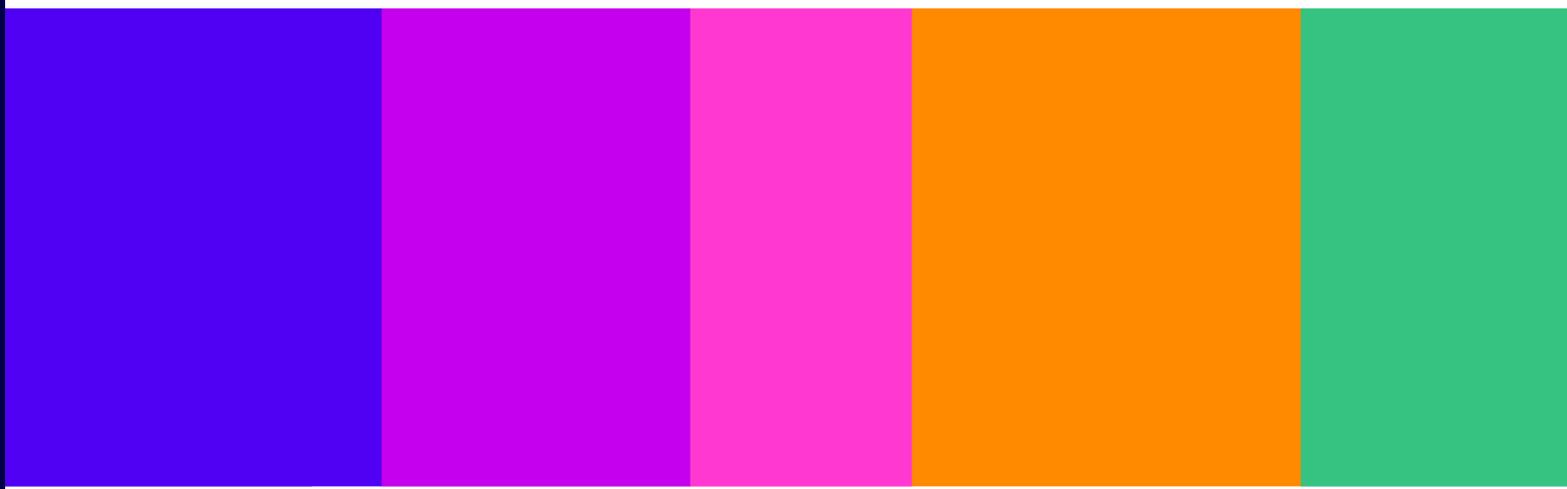


Dispute between Whistl and Royal Mail

Consideration of terms offered in response
to a new access service request

Final conclusions

Published 6 December 2023



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1. Overview

- 1.1 On 8 March 2023, Ofcom accepted for resolution a dispute (the “Dispute”) between Whistl UK Limited (“Whistl”) and Royal Mail Group Limited (“Royal Mail”) (together “the Parties”), concerning whether Royal Mail responded to a New Service Access Request¹ (“NSAR”) made by Whistl with terms, conditions and charges that were fair and reasonable.
- 1.2 On 13 September 2023, Ofcom sent a confidential version of its Provisional Conclusions to the Parties for comment. Ofcom subsequently published a non-confidential version for wider comment on 19 September 2023.
- 1.3 Only Royal Mail responded to our Provisional Conclusions, making several observations which we have set out in Annex 1 along with our response to those observations. Having reviewed Royal Mail’s response, we have decided that these do not impact our Provisional Conclusions.
- 1.4 Today, we are publishing our Final Conclusions on this Dispute, which are the same as our Provisional Conclusions.

What we have concluded – in brief

The scope for the Dispute was published on [our website](#) on 8 March 2023 and it was to determine:

- a) whether Royal Mail can pass on the costs of complying with its obligations under access condition USPA 5.3 to Whistl via the charges that Whistl would pay for the tracked large letter service it has requested; and
- b) whether access condition USPA 5.4(b) allows Whistl to consent in writing to the disclosure or use of information Royal Mail would obtain as a result of providing the tracked large letter service that has been requested by Whistl such that access condition USPA 5.3 does not apply in the context of providing that service.

In relation to a) - we conclude that Royal Mail can pass on the costs of complying with its obligations under access condition USPA 5.3 to Whistl. In our view, compliance with USPA 5.3 is an integral part of providing an access service and therefore it is fair and reasonable for the costs to secure compliance with USPA 5.3 to be considered as part of the costs of providing the service.

In relation to b) – we conclude that although Whistl can mechanically consent in writing to the disclosure or use of information Royal Mail would obtain as a result of providing the tracked large letter service that has been requested by Whistl, in the specific context of providing the service requested, we consider that USPA 5.3 continues to apply. In our view, we consider Whistl’s consent was related only to the disclosure of its information and not its use, and therefore there was not a full disapplication of USPA 5.3. We have also set out our views on the considerations if USPA 5.3 were to be fully disappplied in this case.

¹ A New Service Access Request is a process through which Royal Mail Wholesale can create a new service or make variations to existing agreements: [Royal Mail Wholesale - New Service Development](#).

The overview section in this document is a simplified high-level summary only. The Final Conclusions and our reasoning are set out in the full document.

2. Background and legal framework

2.1 This section sets out some background to access mail and the legal framework for Ofcom's access regime.

Access mail in the postal services value chain

- 2.2 Postal services play a key role in society, with the ability to send and receive letters being important both socially and economically. As noted in our Annual Monitoring Update for Postal Services,² the letters and large letters³ mail sector consists of two main segments:
- a) **Royal Mail end-to-end mail** – letters collected and delivered by Royal Mail, which can be further divided into bulk and non-bulk mail. Bulk mail involves Royal Mail collecting large volumes of mail directly from larger businesses (or other organisations) and then using its network to sort, distribute and deliver these. Non-bulk mail is mainly made up of single piece letter services that Royal Mail is required to offer under the Universal Service Obligation;⁴ and
 - b) **Access mail** – bulk mail collected by competing access operators from larger businesses and organisations, which is then inserted into Royal Mail's network for delivery. Access competition enables other operators to offer postal services to their customers without setting up a 'last mile' delivery network, and to compete with Royal Mail in the offer of initial stages of processing post.⁵
- 2.3 The bulk letters market is subject to access competition where a postal operator other than Royal Mail collects mail from the customer, sorts it and then transports it to Royal Mail's Inward Mail Centres ("IMCs"), where it is handed over to Royal Mail for delivery. The value chain in postal services, including both Royal Mail's end-to-end delivery network and access services, are shown in the diagram below.

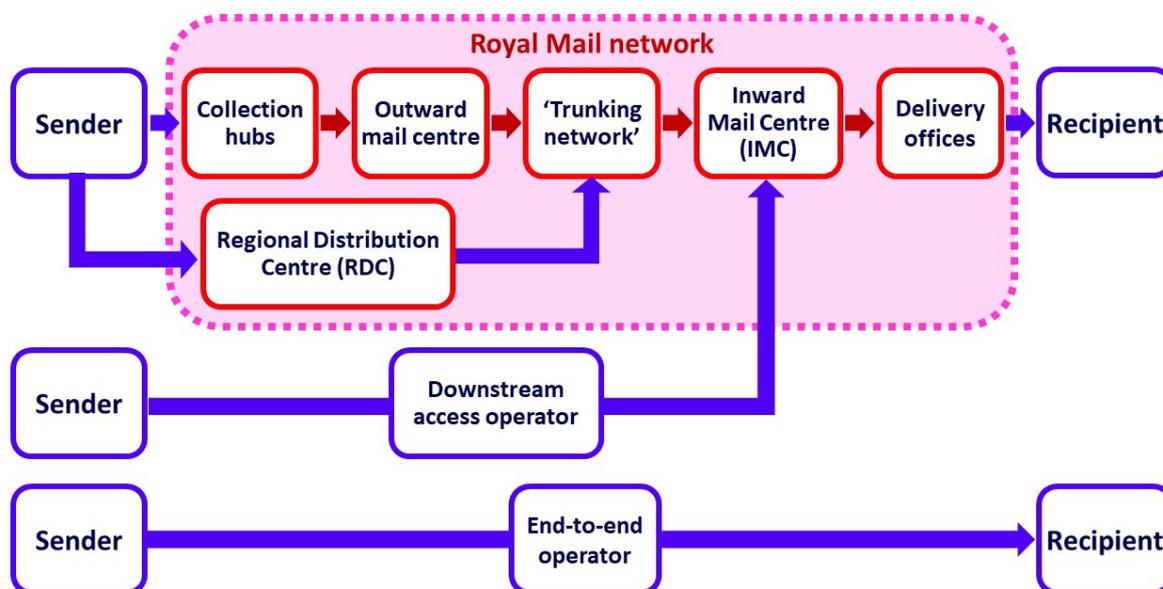
² Ofcom, 2022, [Annual Monitoring Update for Postal Services: Financial year 2021-22](#).

³ Letters can be up to 24cm long, 16.5cm wide and up to and including 0.5cm thick, with a maximum weight of 100g. Large letters can be up to 35.3cm long, 25cm wide and up to and including 2.5cm thick, with a maximum weight of 750g.

⁴ As the Designated Universal Service Provider, Royal Mail is required to provide a universal postal service, including delivery and collection of letters, six days per week, Monday to Saturday.

⁵ Ofcom, 2022, [Annual Monitoring Update for Postal Services: Financial year 2021-22](#), para. 3.30.

Figure 1: Postal services value chain, including end-to-end and access mail



- 2.4 Royal Mail is the only postal operator in the UK with a nationwide end-to-end letter delivery network encompassing upstream and downstream services for letter delivery. Royal Mail charges the access operator for access to the downstream part of the network.⁶ There are more than 10 access operators which use Royal Mail’s postal delivery network to compete for retail bulk letter users, including Whistl.⁷
- 2.5 In our [2022 Review of Postal Regulation](#) (the “2022 Review”), we found that the current access framework is working well in supporting competition in bulk letters, with access operators accounting for over 70% of retail bulk letter volumes. Access mail collected by competing access operators continued to make up the majority of letters sent in 2021/22 at 5.39 billion items – 66.9% of total addressed letter volumes. However, over time, there has been a fall in the number of bulk letters delivered in the UK, in line with the number of letters in general. Access bulk letters reduced from 7.12 billion items in 2015/16 to 5.39 billion items in 2021/22.⁸
- 2.6 In the 2022 Review, we noted that we expect the long-term declining trend in bulk letters to continue, as bulk mail users continue to migrate to online communications. However, we further noted that regulatory requirements for paper correspondence and difficulty in moving some customers online means that bulk letters will continue to be important. Therefore, our expectation is that bulk letters will remain a core postal service and a core contributor to a financially sustainable universal service.⁹

⁶ Ofcom, 2014, [Royal Mail Access Pricing Review: Proposed amendments to the regulatory framework](#), para. 3.10.

⁷ Ofcom, 2022, [2022 Review of Postal Regulation: Statement](#), para. 8.12.

⁸ Ibid, para. 8.6.

⁹ Ibid, para. 8.6-8.10.

Legal framework and the access regime

Ofcom's duties

- 2.7 Section 3(1) of the Communications Act 2003 (the “2003 Act”) provides that it shall be Ofcom’s principal duty, in carrying out its functions:
- a) to further the interests of citizens in relation to communications matters; and
 - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.¹⁰
- 2.8 In giving effect to our principal duty, we are also required to have regard to a range of other considerations, which appear to us to be relevant in the circumstances, as set out under section 3(4) of the 2003 Act. We also must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed,¹¹ as well as the interests of consumers in respect of choice, price, quality of service and value for money.¹²
- 2.9 Services in relation to which Ofcom has functions include the provision of postal services by postal operators, which may be subject to regulatory conditions that Ofcom may impose on them under the Postal Services Act 2011 (the “2011 Act”).¹³ Therefore, our principal duty applies also to functions carried out by Ofcom in relation to postal services.
- 2.10 We also have a duty under section 29(1) of the 2011 Act to carry out our functions in relation to postal services in a way that we consider will secure the provision of a universal postal service, to which we must give priority if we consider that there is any conflict with our principal duty under the 2003 Act.¹⁴
- 2.11 The universal postal service is a set of services described in an order made by Ofcom.¹⁵ Retail bulk mail services are not a part of the universal service as described in that order, but Royal Mail uses the same postal network to deliver bulk mail and the universal postal service.¹⁶
- 2.12 Section 29(3) of the 2011 Act provides that in performing its duty under section 29(1), Ofcom must have regard to the need for the provision of a universal postal service to be:
- a) Financially sustainable; and
 - b) Efficient before the end of a reasonable period and for its provision to continue to be efficient at all subsequent times.
- 2.13 The concepts of ‘financially sustainable’ and ‘efficient’ are not defined in the 2011 Act, however, section 29(4) states that the need for the universal postal service to be ‘financially sustainable’ includes the need for ‘a reasonable commercial rate of return’ for any Universal Service Provider (“USP”) on any expenditure incurred by it for the purpose of, or in connection with, the provision by it of a universal postal service.

¹⁰ Section 3, 2003 Act, [Communications Act 2003 \(legislation.gov.uk\)](#).

¹¹ Section 3(3), 2003 Act.

¹² Section 3(5), 2003 Act.

¹³ Postal Services Act 2011, [Postal Services Act 2011 \(legislation.gov.uk\)](#).

¹⁴ Section 3(6A), 2003 Act.

¹⁵ The Postal Services (Universal Postal Service) Order 2012 (SI 2012/936) as amended by The Postal Services (Universal Postal Service) (Amendment) Order 2013 (SI 2013/3108).

¹⁶ Ofcom, 2014, [Royal Mail Access Pricing Review: Proposed amendments to the regulatory framework](#), para. 2.5-2.9.

- 2.14 In relation to postal services, Royal Mail has been designated as the Universal Service Provider (USP).

The access regime

Ofcom's powers to impose a USPA Condition

- 2.15 Pursuant to section 38 of the 2011 Act, Ofcom may impose a USP Access Condition ("USPA" or "USPA Condition") on a USP, requiring the provider to do either or both of the following:
- a) To give access to its postal network to other postal operators or users of postal service; and/or
 - b) To maintain a separation for accounting purposes between such different matters relating to access (including proposed or potential access) to its postal network as Ofcom may direct.
- 2.16 The kind of matters that may be included in a USPA Condition are set out in Schedule 3 to the 2011 Act.

Current access framework

- 2.17 The current access regime imposes a USPA Condition on Royal Mail to provide certain wholesale bulk mail services. Specifically, the USPA Conditions require Royal Mail to offer access, on reasonable request, to its postal network for:
- a) D+2 and later than D+2 Letter and Large Letter services ("D+2");¹⁷ and
 - b) D+5 Letter and later than D+5 Letter services ("D+5").¹⁸ (We extended the USPA Condition to cover this new D+5 service in March 2021).
- 2.18 Royal Mail is required to provide access to its network for these services at its IMCs.
- 2.19 The current access conditions¹⁹ give Royal Mail the commercial and operational flexibility to set the terms, conditions and charges of its access services. However, given Royal Mail's position as the sole supplier of access services and competitor of access operators through its retail bulk services, we have imposed a number of safeguards to address possible imbalances in negotiating power between Royal Mail and access users. These safeguards include a requirement on Royal Mail to:
- a) Provide access on fair and reasonable terms, conditions and charges;²⁰
 - b) Not unduly discriminate, and to restrict its use of information obtained in connection with giving access;²¹
 - c) Publish a copy of its standard terms and conditions and provide notification of changes to these terms and conditions;²²
 - d) Comply with a control to prevent a price squeeze on mandated access services;²³

¹⁷ The expression "D+2 and later than D+2 Letters and Large Letters services" is defined in USPA 1.3(h) as meaning retail services that aim to deliver two working days (or later) after collection from the sender, also known as a day C service, or later.

¹⁸ "D+5 and later than D+5 Letters services" means retail services that aim to deliver Letters within five working days (or later) after collection from the sender.

¹⁹ Ofcom, [Universal Service Provider access conditions](#).

²⁰ USPA 3.

²¹ USPA 5.

²² USPA 7.2.

²³ USPA 6.1.

- e) Have a statement of the process that will apply to requests for new access services, or to variations to existing mandated access contracts (commonly referred to as the “Statement of Process”);²⁴ and
 - f) Publish such information as is reasonably necessary for the purposes of securing transparency as to the quality of service of its downstream access services.²⁵
- 2.20 Our current approach to postal access has been to afford Royal Mail and industry commercial flexibility in deciding the specific terms of any agreement. This was intended to reduce the risk of regulation inadvertently hindering the market from responding to changing market conditions in an efficient and timely manner and was seen to be particularly important in the context of declining letter volumes.²⁶

Relevant USPA Conditions

2.21 The relevant USPA Conditions for this dispute are USPA 5.3 and 5.4.

2.22 USPA 5.3 states:

“Subject to USPA 5.4, the universal service provider shall use all reasonable endeavours to secure that no information in the possession of the universal service provider as a result of giving access to its postal network under any USPA Condition to other persons—

- a) is disclosed for the benefit of or used for the purpose of any trading business conducted by the universal service provider; or
- b) is disclosed for the benefit of or used for the purpose of any trading business conducted by any related person of the universal service provider.”

2.23 USPA 5.4 states:

“USPA 5.3 shall not apply in so far as—

- a) OFCOM may consent in writing;
- b) every person to whom the information relates has consented in writing to its disclosure or use as mentioned in USPA 5.3;
- c) the disclosure is to, or the use is by, a person who—
 - i) is acting as an agent of the universal service provider for the provision of postal services to the person to whom access has been given and only for that purpose;
 - ii) is engaged by the universal service provider for the purpose of the universal service provider’s business as a postal operator and has access to the information only for that purpose; and
 - iii) is restricted by contract with the universal service provider from making any further disclosure or use of the information; or
- d) the information has been published or is required to be disclosed in pursuance of any other regulatory condition to which the universal service provider is subject; or
- e) the information is in the public domain otherwise than in consequence of a contravention of any regulatory condition to which the universal service provider is subject.”

²⁴ USPA 4.1.

²⁵ USPA 8.1.

²⁶ Ofcom, July 2022, [Statement: 2022 Review of Postal Regulation](#)), Section 8.

Access disputes

Ofcom's powers to resolve access disputes

- 2.24 Under Schedule 3, paragraph 13 of the 2011 Act, disputes that meet the definition of an “access dispute” can be referred to Ofcom. An “access dispute” is a “dispute between postal operators,²⁷ or between a postal operator and a user of postal services, about the terms and conditions (including those as to price) on which access, required by virtue of an access condition to be given— (a) is to be or may be provided, (b) is being provided, or (c) has been provided”.
- 2.25 An access dispute must be referred to Ofcom in the manner that Ofcom require (Schedule 3, paragraph 13(3) of the 2011 Act), as set out in Ofcom’s Dispute Resolution for postal disputes supplement guidance.²⁸
- 2.26 When a dispute has been referred to Ofcom under Schedule 3, paragraph 13 of the 2011 Act, Ofcom must decide whether it is appropriate for Ofcom to handle the dispute (Schedule 3, paragraph 14). We have a broad discretion as to whether to accept a postal dispute for resolution, which includes the discretion to reject such a dispute on the basis we consider further negotiations should be undertaken.

Ofcom's powers when determining a dispute

- 2.27 The powers that may be exercised by Ofcom, on the making of a determination, are set out in paragraph 16 of Schedule 3 of the 2011 Act. These powers are:
- a) To make a declaration setting out the rights and obligations of parties to the dispute;
 - b) To give a direction fixing the terms or conditions of transactions between parties to the dispute;
 - c) To give a direction imposing an obligation, enforceable by the parties, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom;
 - d) To give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment;²⁹
 - e) To require a party to the dispute to pay all or part of another party’s costs and expenses incurred in connection with the dispute; and
 - f) To require a party to pay all or part of Ofcom’s costs of dealing with the dispute.³⁰
- 2.28 Ofcom may also exercise its discretion in the number of the above powers it may choose to exercise (including, where appropriate, none of these powers).

²⁷ A postal operator is “a person who provides— (a) the service of conveying postal packets from one place to another by post, or (b) any of the incidental services of receiving, collecting, sorting and delivering postal packets” (s. 27(3) of the 2011 Act).

²⁸ Ofcom, April 2012, [Dispute Resolution for postal disputes – Supplement to Ofcom’s guidelines for the handling of regulatory disputes](#).

²⁹ Such a direction may be given only for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one party to the dispute to another.

³⁰ Such a direction may only be given to a party who referred the dispute to Ofcom, where Ofcom consider that the reference was frivolous or vexatious, or that the party has otherwise abused the right to refer a dispute.

Ofcom's duties when determining a dispute

2.29 When Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties and with its duties under the 2011 Act, as set out in Ofcom's supplemental guidance on Dispute Resolution for postal disputes.³¹

Accepting the Dispute

2.30 In line with the requirements of Schedule 3 of the 2011 Act and Ofcom's Dispute Resolution Guidelines,³² including the supplement relating to postal disputes,³³ we carefully considered the representations made by both Whistl and Royal Mail. In our view we considered that it was unlikely that further negotiations between Whistl or Royal Mail would resolve the issue because of the fundamentally divergent views both parties had in relation to how Royal Mail planned to respond to the NSAR and the level of costs involved. We were therefore satisfied there was an "access dispute" within the meaning of Schedule 3, paragraph 13 of the 2011 Act, on the basis that:

- a) Both Whistl and Royal Mail are postal operators, as defined under section 27(3) of the 2011 Act.
- b) There is a dispute concerning the terms and conditions on which access, required to be given by virtue of access condition USPA 3.1, may be provided.³⁴ Specifically, Whistl has made a request to Royal Mail for a new access tracked large letter service. Whistl contends (and Royal Mail disputes) that the terms on which Royal Mail proposes to provide access are not fair and reasonable because:
 - i) Royal Mail is unfairly and/or unreasonably proposing to pass the costs of complying with its obligations under access condition USPA 5.3 onto Whistl via the charges Whistl would pay for the proposed access service; and
 - ii) Royal Mail is unfairly and/or unreasonably and/or otherwise illegitimately refusing to provide an access solution that does not involve "ring-fencing".³⁵

2.31 A signed dispute referral made in the required manner was received by Ofcom on 5 October 2022.

2.32 After receiving the initial dispute submission from Whistl ("Whistl's Submission"), we engaged with both Royal Mail and Whistl in setting the scope of the Dispute.³⁶ On 8 March 2023, we formally informed both Whistl and Royal Mail of our decision that it was appropriate for us to handle the Dispute for resolution and set out our decision on the scope of the Dispute.

³¹ Ofcom, 2012, [Dispute Resolution for postal disputes](#), page 3.

³² Ofcom, June 2011, [Dispute Resolution Guidelines – Ofcom's guidelines for the handling of regulatory disputes](#).

³³ Ofcom, April 2012, [Dispute Resolution for postal disputes – Supplement to Ofcom's guidelines for the handling of regulatory disputes](#).

³⁴ USPA 3.1 specifies that "The provision of D+2 Access in accordance with USPA 2.1 above and pursuant to any existing D+2 Access Contract shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as OFCOM may from time to time direct."

³⁵ Included in this is Whistl's complaint that Royal Mail refuses to accept its waiver under USPA 5.4, which would disapply Royal Mail's USPA 5.3 obligations; see paragraphs 3.24-3.27 below.

³⁶ We set out this process in more detail in Section 3 below.

Structure of this document

2.33 The remainder of this document is largely unchanged from the Provisional Conclusions and is set out as follows:

- a) Section 3 sets out more detail on the Dispute and the original submissions made by the Parties.
- b) Section 4 sets out our analysis and confirms our Final Conclusions which are unchanged from our Provisional Conclusions.
- c) Annex 1 is a new annex and sets out the comments from Royal Mail, the only respondent, and our views on those comments.

3. The Dispute

- 3.1 On 5 October 2022, Whistl submitted the Dispute to Ofcom, alleging that Royal Mail did not respond to its NSAR for a tracked large letter product with terms, conditions and charges that were fair and reasonable, as required under the USPA Conditions.³⁷ After we received the Dispute, Ofcom engaged with both Whistl and Royal Mail to understand the key facts of the Dispute and the outcome Whistl sought. After considering representations from the Parties, on 8 March 2023 we decided it was appropriate to open a dispute and defined the scope as follows:
- a) Whether Royal Mail can pass on the costs of complying with its obligations under access condition USPA 5.3 to Whistl via the charges that Whistl would pay for the tracked large letter service it has requested; and
 - b) Whether access condition USPA 5.4(b) allows Whistl to consent in writing to the disclosure or use of information Royal Mail would obtain as a result of providing the tracked large letter service that has been requested by Whistl such that access condition USPA 5.3 does not apply in the context of providing that service.
- 3.2 The remainder of this section sets out the background to the Dispute, including details of Whistl’s NSAR, details of the subsequent commercial negotiations that took place and the submission of the Dispute.

Whistl’s NSAR

- 3.3 On 1 July 2021,³⁸ Whistl made an NSAR to Royal Mail for a tracked large letter service. Whistl described the service it was requesting as:
- “Wholesale equivalent of the Royal Mail Retail Tracked 48 (T48) and Tracked 48 ‘Signed for’ products for Large Letters using existing RM [Royal Mail] Tracked IT infrastructure - where Whistl replaces Royal Mail’s upstream collection and delivery to IMC for onward tracked delivery the following day.”
- 3.4 In the section entitled “*Objective of the product*”, Whistl wrote:
- “The key service features will mirror the service features of T48 in every respect, save that the parcels³⁹ will not be collected by Royal Mail, but will be delivered to the Inward Mail Centre by Whistl, which is where the first track by Royal Mail will occur. The product will use a standard RM Tracked barcode and will not use the Mailmark⁴⁰ barcode nor Dockethub/EHMS. The management information will mirror the current T48 specification as far as it is relevant.”

³⁷ Ofcom, [USP Access Condition](#), D+2 Access and D+5 Access.

³⁸ Whistl initially submitted a request on 30 June 2021, but revised and re-sent it on 1 July. The changes made do not appear to relate to this dispute and the 1 July request is referenced throughout the negotiations.

³⁹ While Whistl mentioned parcels here, the NSAR specifically related to large letters.

⁴⁰ “Mailmark” is an option with some of Royal Mail’s Access products. [Royal Mail’s Wholesale website](#) describes it as: “Mailmark barcode technology offers web-based reporting from an online analytics dashboard - showing detailed batch level reporting on predicted delivery, volume and performance as well as item level error reporting.”

3.5 In the section entitled “*ICT and billing requirements*”, Whistl wrote:

“We do not wish to use Dockethub and EHMS for this service as it is both unnecessary and would require prohibitively expensive bespoke solutions. The current RM Parcels systems and barcodes are clearly appropriate for this service and we are both familiar with and happy to use the existing forecasting, pre-advice, reporting and billing as provided by the existing systems. This will minimise additional cost for both Whistl and Royal Mail. Whistl has already made the investment to integrate the Royal Mail T48 product within its own Carrier Management Systems.”

Negotiations process

3.6 On 8 July 2021, Royal Mail responded to Whistl’s request, advising it could not accept the application because of USPA 5 concerns and the practical difficulties it would raise:

“We do not consider that it would be appropriate to accept and take forward your request as currently drafted as a formal Access New Service Request. This is primarily because if we were to proceed with providing you with this type of service in access, under the existing Access Letters Contract, and pursuant to the strict requirements of the USP Access Condition, this would raise very significant USPA5 and other operational difficulties for us.”

3.7 The specific concerns relating to USPA 5 that Royal Mail set out can be summarised as follows:

- a) concerns relating to tracking data being available for all its Retail colleagues to see and potentially use; and
- b) undermining the existing ring-fencing arrangements within Royal Mail by creating a hybrid system which could create confusion for Royal Mail Wholesale employees as a result of mixing “*certain types of Wholesale data so that some is within the ring-fence, and some is not*”.⁴¹

3.8 At the same time, Royal Mail set out its view that it would not be appropriate, or feasible, for Whistl to give consent to disclosure under USPA 5.4(b):

“The service would need to be made available to all access customers and we would therefore need a general consent from all operators before designing the service and making it generally available (as otherwise we would be at risk of discriminating against those who are unwilling to give their consent). Our view is that the carve out in USPA5.4(b) is designed for one-off disclosures of specific information – not an ongoing, permanent waiver in relation to all information for a particular product, namely tracking information for General Large Letters.”

3.9 Royal Mail also explained the practical difficulties this hybrid approach would have, particularly in relation to IT systems:

⁴¹ Except where otherwise stated or qualified, by “ring-fencing”, we refer to Royal Mail’s practice of using separate systems to reduce the risk of information that has been provided to Royal Mail Wholesale from being shared with Royal Mail Retail.

“The ‘hybrid’ service you are suggesting presents certain other practical technical and/or operational considerations. Your proposal requires us to scope how the Retail IT systems can be adapted for the purpose of forecasting, billing and the provision of tracking data in order to develop an Access Tracked service. Aside from any adaptations we need to make for ring-fencing which will incur cost for the required IT development, we will need to consider the impact on operational arrangements, including the handover of Tracked GLL [General Large Letters] within the current Access slots, container management and understanding of where items are in our network, etc. DSACC and Access systems do not currently have access to Retail tracking data – so again we would need to understand what adaptation of systems is needed to make that work.”

- 3.10 In light of the concerns raised, Royal Mail offered Whistl two possible alternatives to progress the application:
- to take forward its request with Royal Mail Retail given what Whistl is “effectively asking for currently is some form of workshare on a retail solution.”
 - amend and resubmit the application in such a way that enables Royal Mail to maintain its “USPA5 ring-fencing obligations in the provision of tracking on Fulfilment Large Letters on the access offering.”
- 3.11 Whistl and Royal Mail held an online video call later that day, with Whistl emailing a summary note of the meeting to Royal Mail on 10 July 2021. In the email, Whistl set out its response to some of the points raised in Royal Mail’s email of 8 July 2021. Amongst other things, Whistl noted that it preferred to deal with the Royal Mail Wholesale team as they “*would be more keenly aware of its regulatory responsibilities regarding an access request*”. It also noted that it had sought and received contractual reassurance that the retail systems could keep the information confidential.
- 3.12 On 15 July 2021, Royal Mail emailed Whistl informing it that it had enough information about the service requested and was ready to progress to Stage 2 of the NSAR process. In the email, Royal Mail referenced Whistl’s specific design request in its NSAR and stated that it will do its:
- “utmost to provide an appropriate solution in line with your request. It is important to be reminded that some of components referenced may still be required in the solution design in order that Royal Mail can operate effectively.”
- 3.13 Royal Mail then reiterated its concerns around USPA 5, stating:
- “We will explore available options, and the implications of each, such that we can collectively make informed decisions on how best to proceed. We will need to ensure that any solution enables us to meet our legal and regulatory obligations, including USPA5.”
- 3.14 On 21 July 2021, Whistl responded to Royal Mail setting out its view on a number of points raised in Royal Mail’s email of 15 July 2021. Of particular relevance, Whistl considered that:
- Royal Mail’s construct of “*Wholesale*” and “*Retail*” teams was done for historical reasons and “*that there is nothing inherent in USPA5 that requires separate IT systems*”. In fact, having these separate IT systems has “*led to an inability to*

innovate in Access because Royal Mail insists on using systems that do not currently have tracking functionality (rather than using the existing Royal Mail systems that do have that functionality) and then have tried to pass the cost of providing such functionality on to Access requestors.”

- Royal Mail was able to “*achieve the necessary ring-fencing of information within existing retail systems. We know this to be true as Royal Mail has already agreed to a binding contract in which Royal Mail has agreed to keep all our customer information...in retail systems confidential and shared within Royal Mail only on a ‘need to know’ basis.*” Whistl considered this clause should mean that Royal Mail would not be open to any USPA 5 exposure.
- Even if Royal Mail was exposed to USPA 5 as a result of this NSAR, the costs of complying with the regulatory obligations should be borne by Royal Mail.

3.15 On 30 July 2021, Royal Mail sent Whistl the Gateway 2 documentation relating to its NSAR.⁴² In the covering email, it provided details of the two design options it had identified as being the most suitable to deliver the service Whistl required and noted it would “*continue to assess which option will provide the service you require in the most cost effective and efficient way.*” The two options were:

- a) Introduce USPA 5 ring-fencing within Retail parcel tracking systems; or
- b) Enhance Mailmark systems to provide tracking.

3.16 Royal Mail also provided an early estimate of what it considered the system development cost might be. The estimate it provided was between £[X] and £[X] with an additional £[X] to £[X] for ongoing annual maintenance costs. It noted it would “*continue to refine the options with the aim of providing a more refined budgetary assessment by the end [of] stage 3*” and that it would “*also consider how best to recover the development costs in a fair and reasonable manner, and will provide more information on this at the end of Stage 3.*”

3.17 Royal Mail also responded to a number of points in Whistl’s email of 21 July 2021. Of particular relevance were the following:

- USPA 5 does not apply to Royal Mail’s supply or fulfilment large letter services in Retail – Retail is free to negotiate confidentiality arrangements with customers.
- The existing confidentiality clause between Whistl and Royal Mail would “*fall well short of the obligation we have in Access under USPA 5*”.
- It does not agree with Whistl’s position that Royal Mail’s construct of “*Wholesale*” and “*Retail*” teams was done for historical reasons and “*that there is nothing inherent in USPA5 that requires separate IT systems*”. It noted that its Retail letter business is active in competing for mail volumes and “*it would be a material advantage for them to be able to access information from IT systems (either accidentally or otherwise) on what access operators are doing, which contracts they hold, and to have no restrictions on the retail price they can charge*”.
- “*One of the most basic steps [Royal Mail] can take to comply with USPA 5 [is] to have separate storage systems including IT storage, for Retail and Wholesale data*”.
- Tracking was a feature developed for Royal Mail’s “*Parcels business*” – which we understand to mean Royal Mail Retail’s parcel services – and it was “*entirely*

⁴² The Gateway 2 documentation set out the initial drafts for 1) the Milestone Plan, 2) the Latest version of the Issue log and 3) the High level Service specification & Systems specification. Royal Mail sets out its eight-stage gateway approach here: [Access service new request - eight stage gateway approach](#).

legitimate and appropriate for us to develop this functionality in our parcels business without having regard to whether we might need to also provide this in access”.

- 3.18 On 2 August 2021, Whistl expressed its dissatisfaction to Royal Mail and asked it to cease progressing the Mailmark option, saying that Royal Mail’s investigations into an enhanced Mailmark solution was *“the diametric opposite of our request and has no merit”*.
- 3.19 Whistl stated that:
- “Royal Mail have willingly entered into a contract that ensures a very high degree of confidentiality for the data provided by us on tracked services for parcels, which we believe is at least as good (if not better) than the safeguards provided by the Access contracts. Given Royal Mail’s regulatory Access obligations on confidentiality it is reasonable for us to expect that these self same binding obligations can be offered on Large Letters that are tracked and processed with the self-same systems.”*
- 3.20 Whistl then asked Royal Mail to:
- “proceed to stage three... as requested with a focus on using the existing retail infrastructure so that change is largely unnecessary, development costs avoided and access granted speedily.”*
- 3.21 Royal Mail responded on 2 August 2021 setting out that Whistl misunderstood the extent of the data controls for the Retail business and noted *“they are not designed to and nor do they adequately meet the obligations we have under UPSA 5”*. It also stated that it would:
- “be happy to proceed to Stage 3 with an understanding that we continue to scope both systems options until such time it becomes clear that one is likely to be more cost effective and efficient than the other ... We request that you confirm you are happy for us to proceed to stage 3 on the basis that we will refine the systems options as we progress through the new service request process.”*
- 3.22 On 13 August 2021,⁴³ Royal Mail provided the Gateway 3 deliverables containing more details on both the Mailmark and Retail Barcode options.⁴⁴ In the covering email it also set out its consideration of how its six cost recovery principles applied to Whistl’s request.⁴⁵
- 3.23 On 16 August 2021, Whistl again asked for Royal Mail to cease exploring the Mailmark option. It also requested that Royal Mail’s stage four deliverables separately set out the *“systems work, time and cost needed”* for the operational solution and for the access controls. The purpose of this request was to *“assess and consider the cost and time benefit of applying the waiver as detailed in USPA5.4.”* In regard to the cost recovery principles, Whistl considered it was premature to discuss these and therefore it could not accept them.

⁴³ There was some correspondence between Royal Mail and Whistl between 2 and 13 August 2021, including an email from Whistl to Royal Mail on 3 August, but these largely reiterated previous points made by Whistl so we have not listed them here.

⁴⁴ The Gateway 3 deliverables documentation included the latest drafts for the 1) Milestone Plan/Issue log, 2) Draft service specification and 3) Draft systems specifications.

⁴⁵ Royal Mail’s cost recovery principles are set out in paragraph 4.4. In brief, these relate to cost causation, distribution of benefits, cost minimisation, practicability, level of risk and competition.

Whistl's waiver offer

- 3.24 On 2 September 2021, Whistl offered Royal Mail a waiver under USPA 5.4(b) (the "Waiver"). In offering the Waiver, Whistl noted Royal Mail's position that its *"retail system would not adequately protect our data to a standard that you believe would meet your obligations under USPA 5"* and considered that this offer would assist Royal Mail in *"feeling more comfortable"* and protect their position. Whistl then reiterated its view that if Royal Mail still considered it necessary to *"build safeguards which are unnecessary, any such costs must not form part of the price of using such a service."*
- 3.25 On 9 September 2021, Royal Mail rejected the Waiver (referring to its prior comments from 8 July 2021). Royal Mail reiterated its view that USPA 5.4(b) did not permit Whistl to give an ongoing, permanent waiver of the type proposed and instead, it was designed for one-off disclosures of specific information. It also set out that even with Whistl offering the Waiver, this did not negate the need for Royal Mail to comply with USPA 5.3.
- 3.26 Royal Mail also shared with Whistl some of the systems and structures it had put in place to meet its USPA 5 obligations, which included:
- Setting up and maintaining separate IT billing and customer data systems for the Wholesale business;
 - Ensuring that the Wholesale business unit is otherwise separate from the Retail business units;
 - Providing Wholesale (and relevant Group Function) employees with Compliance Training and Communications; and
 - Requiring relevant employees to sign a non-disclosure agreement which sets out the obligations in relation to USPA 5 information.
- 3.27 In light of the systems and structures it has in place and its view that a waiver under USPA 5.4(b) is designed for one-off disclosures of specific information, Royal Mail explained that:
- "it would cause material damage to the structure and ethos of those arrangements if we had carve outs for whole product categories, such as tracked fulfilment large letters. It would complicate processes agreed with Ofcom, undermine and potentially confuse our employees' understandings of their obligations, as well as add complications, weaknesses and potentially significant unnecessary expense in the long term to existing separated IT and billing systems."*

Offer terms from Royal Mail to Whistl

- 3.28 On 8 November 2021 Royal Mail provided Whistl with its stage 4 response comprising the indicative offer. The indicative offer included a Cover Letter, Heads of Terms and a Service Specification. The Cover Letter set out, amongst other things:
- Royal Mail had scoped both a solution *"using existing Retail barcoding and tracking data"*⁴⁶ and *"a solution which uses Mailmark barcoding systems"* and that although the costs would be broadly the same, it decided to proceed with the Mailmark option due to USPA 5 concerns with the retail option, and the Mailmark

⁴⁶ This retail solution would then be ring-fenced from Retail IT systems.

option being a more robust solution long term for its Wholesale customers and it would reduce any risk from using dual IT systems, such as data leakages to its Retail units.⁴⁷

- The estimated IT development work required was £[X].⁴⁸ This included around £[X] of work Royal Mail can carry out internally and around £[X] externally.⁴⁹ Royal Mail noted the costs were considerably less than initially scoped.
- It would only seek to recover the external IT development costs and it proposed to do this through an item level [X]p postage charge.⁵⁰ This charge was based on Whistl's projection in its NSAR that in the first three years there would be [X] million items posted.
- If any third parties took up this service, they would also be required to pay the [X]p postage charge until the development costs were paid off.

3.29 The Heads of Terms also provided additional information about cost recovery. In the event the volume of [X] million items was not met within the first three years of the contract, Whistl would need to pay Royal Mail the remaining development costs. The Heads of Terms also confirmed the price Whistl would be charged for each Tracked Large Letter which was [X]p for 0-750 grams and [X]p for signature add-on.

3.30 On 3 December 2021, Royal Mail emailed Whistl following up on action points regarding a meeting between both parties on 11 November 2021. The action points were:

- "Provide a breakdown of the development costs for the 'Retail Barcode Solution'";
- "Separate out USPA5 and operational costs for the 'Retail Barcode Solution'";
- "Explain why we propose to recover the USPA5 development costs"; and
- "Provide a list of service features".

3.31 In the email Royal Mail responded to each of these points, essentially referring Whistl to Royal Mail's previous correspondence on these matters with Whistl. It also confirmed its position concerning its approach to cost recovery and inclusion of costs for USPA 5 compliance to be "*fair and reasonable*".

3.32 It provided some further information on point 2, explaining that it did not see any benefit of providing the cost breakdown, noting it would not be a straightforward exercise:

"The solution is complex, effecting interoperability between Retail and Wholesale IT systems for range of billing, accounting and operational reasons, as well as ring-fencing."

3.33 However, Royal Mail did refer Whistl to its Guidelines for Access New Service Requests, specifically that "we will operate an 'open book', whereby customers can commission an independent third-party auditor to assess the costs if they wish to do so. The third party auditor must agree to sign an appropriate non-disclosure agreement."

⁴⁷ Royal Mail expected the work to take around 44 weeks.

⁴⁸ Royal Mail explained in the response to Q4 of Ofcom's Request for Information, these costs are subject to VAT.

⁴⁹ The Service Specification in the indicative offer broke these costs down in further detail but not in the way Whistl had requested in its email of 16 August 2021.

⁵⁰ In the Heads of Terms, Royal Mail has defined the [X]p charge as the Development Cost Unit Charge. It also stated that it would be subject to an interest charge.

Raising of a dispute with Ofcom

- 3.34 In April 2022, Whistl shared a draft version of its dispute with Ofcom. Ofcom engaged with Royal Mail in relation to this draft dispute in summer 2022.
- 3.35 Whistl provided Ofcom with a signed dispute referral on 5 October 2022.
- 3.36 After considering Whistl’s submission, on 25 November 2022, Ofcom shared the proposed scope of the Dispute with both parties.
- 3.37 Royal Mail and Whistl both requested some minor amendments to the scope, which Ofcom rejected.⁵¹ On 22 December 2022, Whistl confirmed to Ofcom that it wished to proceed with the dispute referral.
- 3.38 Ofcom proceeded to open the Dispute on 8 March 2023, writing to the Parties to inform them that the Dispute had been opened, confirming that the scope of the Dispute would be the same as shared with the Parties on 25 November 2022 and requesting that any further comments in relation to Whistl’s dispute submission be provided by 29 March 2023.
- 3.39 Ofcom received a response from Royal Mail⁵² on 29 March 2023 but did not receive any further comments from Whistl.

Information relied upon in resolving the Dispute

- 3.40 These Final Conclusions draw on the key information provided by the Parties.
- 3.41 From Whistl we have relied on:
- a) the Dispute Submission and the emails it provided as supporting evidence (“Whistl’s Submission”); and
 - b) responses to follow-up questions since March 2023 (“Whistl’s follow-up responses”).
- 3.42 From Royal Mail we have relied on:
- a) Its submission of 29 March 2023 (“Royal Mail’s Submission”); and
 - b) Its response to our request for information under Schedule 3, paragraph 19 of the Postal Services Act 2011 dated 29 March 2023⁵³ (“Royal Mail’s RFI Response”).
 - c) Its response to our Provisional Conclusions dated 27 September 2023

⁵¹ Ofcom emailed Whistl on 20 December 2022 to inform it the scope would not be changed and to check if Whistl still wished to proceed.

⁵² Royal Mail’s Initial Comments in relation to the Dispute Resolution Proceedings.

⁵³ Royal Mail responded to this request on 26 April 2023.

4. Analysis and Final Conclusions

Analytical framework

- 4.1 In this section we set out:
- a) The questions we have considered in order to resolve the Dispute and what we cover under each of these questions;
 - b) Our analysis; and
 - c) Our Final Conclusions.
- 4.2 Our Final Conclusions are unchanged from our Provisional Conclusions.

Question 1: Can Royal Mail pass on the costs of complying with its USPA 5.3 obligations?

- 4.3 Under this question we set out the following:
- a) Relevant details of Royal Mail's Statement of Process for NSARs;
 - b) The application by Royal Mail of its cost recovery principles in this case;
 - c) The Parties' proposed approaches to cost recovery; and
 - d) Our Final Conclusions on whether Royal Mail can pass on the costs of complying with its USPA 5.3 obligations.

Royal Mail's Statement of Process

- 4.4 As mentioned in Section 2, Royal Mail is required to offer access under USPA 2, and to do so on fair and reasonable terms, conditions and charges under USPA 3. It is also required by USPA 4 to publish a statement of the processes that will apply to NSARs (and variations to existing access contracts).
- 4.5 In June 2019, Royal Mail issued a decision, following industry engagement and consultation, setting out its revised approach to NSARs. Amongst other things, it set out Royal Mail's cost recovery principles for such requests.⁵⁴ These principles are:
- Cost causation – costs will be recovered from those whose actions cause the costs to be incurred.
 - Distribution of benefits – costs should be recovered from the beneficiaries of the new service.
 - Cost minimisation – the mechanism for cost recovery should ensure that there are strong incentives to minimise costs.
 - Practicability – the mechanism for cost recovery needs to be practicable and relatively easy to implement.
 - Level of risk – In determining the payback mechanism and period, Royal Mail will take account of the size and risk profile of the investment outlay. This is likely to depend on, amongst other things, certainty around the associated mail volumes.

⁵⁴ Royal Mail, 2019, [Decision on changes to the Access Service Request Process](#).

- Competition – Royal Mail will take into account factors to ensure the mechanism for cost recovery does not unfairly hinder effective competition.

4.6 We understand that these cost recovery principles are based on Ofcom’s cost recovery principles when considering pricing decisions for wholesale access and requests made by BT in telecommunications markets.⁵⁵ In our 2022 Review, we noted that we had not considered how, in practice, Royal Mail had applied these principles. However, we did note that Royal Mail’s interpretation of the “competition” principle is not clear and appears to differ from Ofcom’s own cost recovery principles.⁵⁶

Royal Mail’s application of its cost recovery principles to this request

4.7 In terms of the cost recovery principles set out in paragraph 4.4 above, our view is that the most relevant for the purposes of this Dispute are cost causation, distribution of benefits and cost minimisation.

Cost causation

4.8 The costs at the centre of this Dispute are the IT development costs which relate to enhancing Royal Mail Wholesale’s IT systems to enable a tracked product, as well as the management, testing, and delivery of the IT enhancement project. These costs are based on estimates by Royal Mail and quotes from external suppliers that Royal Mail has contracted with for the various components of its IT system upgrade.

4.9 The request for the new service came solely from Whistl. In Royal Mail’s RFI Response, it set out its view that since the request for the new service came solely from Whistl, Whistl should pay the development costs. Royal Mail noted that it may be the case that other access customers become interested in using the proposed service for tracked GLLs, and there should be a mechanism to ensure that if other access customers used the service, they should also contribute their reasonable share.⁵⁷

Distribution of benefits

4.10 In Royal Mail’s Submission, it explained that based on its understanding of the proposed service, it would only benefit those customers who value tracking of GLLs.⁵⁸ Royal Mail also stated that its understanding of the proposed service would not result in any material new parcel volumes for Royal Mail or the market more widely. Therefore, Royal Mail considered that cost should be borne by the applicant, or subsequent users of the service for the period that the development costs were outstanding.

⁵⁵ See Ofcom, 2022 Review of Postal Regulation, [A6. Decision on access regulation: supporting evidence and further detail](#), para. A6.50. The principle of reciprocity is excluded on the basis that Royal Mail considers it is not relevant for the postal sector, and an additional principle on risk has been included.

⁵⁶ Specifically, we said that Royal Mail refers to its cost recovery principle of competition by stating it should “not unfairly hinder effective competition”. We note that we would be concerned if the application of the cost recovery principles had the effect of limiting the ability of access operators to compete effectively in the bulk letters market, either because this prevented access operators from accessing a service and/or access operators were put at a competitive disadvantage against Royal Mail Retail in the provision of bulk letter services. See Ofcom, 2022 Review of Postal Regulation, [A6. Decision on access regulation: supporting evidence and further detail](#), para. A6.51.

⁵⁷ Royal Mail’s Submission, response to question 7.

⁵⁸ Ibid.

Cost minimisation

- 4.11 In relation to the cost minimisation principle, Royal Mail submitted that the estimated costs are lower than expected based on previous exercises.⁵⁹ Royal Mail said this was because it is less reliant on third party contractors, its tracking systems have matured, the organisation has more experience and expertise, and that previous investments in the IT systems have made them more interoperable. In addition, the cost estimates are obtained from suppliers where Royal Mail has already negotiated favourable contractual terms.

The Parties' proposed approaches

Whistl's approach

- 4.12 Whistl's starting point, as set out in its Dispute Submission, is that Royal Mail's obligations under USPA 5 are its own to manage and fund, as it did when the access regime was first introduced.
- 4.13 However, on the basis that Royal Mail can pass on the costs, Whistl considers it is unfair and unreasonable for Royal Mail to be the final arbiter on what solutions are necessary, what these should cost and be able to pass these costs directly onto access customers.
- 4.14 In this specific case, Whistl considers that Royal Mail is unnecessarily insisting on developing a new solution which includes costs associated with USPA 5.3 ring-fencing.
- 4.15 In Whistl's correspondence with Royal Mail, it set out that it was happy to use the existing forecasting, pre-advice, reporting and billing as provided by the existing systems, and argued that this will minimise additional cost for both Whistl and Royal Mail.
- 4.16 Whistl also argues in its correspondence with Royal Mail that relying on contractual provisions is sufficient for Royal Mail to meet its USPA 5.3 obligations which Whistl believes is *"at least as good (if not better) than the safeguards provided by the Access contracts"*.
- 4.17 Whistl further argues that, by insisting on a ring-fenced retail solution to comply with USPA 5.3, Royal Mail is making NSARs uneconomic, and this is stifling competition to the detriment of the market and postal users.

Royal Mail's approach

- 4.18 Royal Mail's starting position is that it is appropriate for it to take into consideration its USPA 5.3 obligations and to recover costs accordingly as per its Statement of Process.
- 4.19 As such, Royal Mail states that it was right for it to only consider options that ring-fenced the relevant information, whether via Retail or Wholesale, and therefore the options it proposed were appropriate.
- 4.20 Royal Mail argues that a "pure" retail service in line with Whistl's request would involve all billing, volume cost and revenue going through its Retail business accounts, and that this was never viable, and that relying on contractual provisions would fall well short of its obligations under USPA 5.3.
- 4.21 Royal Mail argues that, if Ofcom decides that Royal Mail Wholesale should bear all the risk for the costs of developing the new service and/or be required to provide the service outside of the ring-fence, this could have an impact on how Royal Mail recovers USPA 5.3 costs in future and a material bearing on Royal Mail's future financial position in general.

⁵⁹ Ibid.

Ofcom's Final Conclusions on the matters in dispute

- 4.22 In our view, compliance with USPA 5.3 is, in general, an integral part of providing an access service and therefore, it is fair and reasonable for the costs of complying with USPA 5.3 to be considered as part of the costs of providing the service.
- 4.23 However, that does not mean that these costs can necessarily be passed-on (in whole or in part) to the access operator but rather that they should be appropriately considered as part of the cost recovery process.
- 4.24 Of the six cost recovery principles set out in Royal Mail's Statement of Process (see paragraph 5 above), the first two – cost causation and distribution of benefits – are most relevant to determining whether or not the costs can be passed-on, with the remaining four principles more focused on the mechanism by which those costs are recovered. Therefore, our focus here is on how Royal Mail has applied the first two principles. In our view, Royal Mail's approach in this case is consistent with its cost causation principle, as the IT development costs are caused by the NSAR and so should be recovered from the users of that new service.
- 4.25 Royal Mail's proposal also seems consistent with its principle of "distribution of benefits" in that the new service is likely to only benefit those customers who value tracking of GLLs. We have not been provided any evidence that the new service would lead to an increase in overall volumes or otherwise benefit other parties in the market. As such, Royal Mail's proposal seems more appropriate than possible alternatives, namely, to bear the costs and recover the costs from all access seekers (irrespective of whether they would use the new service) by raising access prices.
- 4.26 We note, however, that in general, only costs directly associated with providing the access product should be included in the recoverable costs. In other words, any common costs of Royal Mail should not form part of a specific NSAR price, as those costs would not have been caused by the NSAR. In our assessment, we have not conducted an analysis of the specific cost items in Royal Mail's proposal as it is out of the scope of this determination.
- 4.27 We recognise that the access regime gives Royal Mail flexibility in deciding how the operational elements of its service are structured in order to meet an access request. However, as a general point, we consider that if Royal Mail decides to add additional functionality or 'gold-plate' the solution beyond what is required to comply with its access conditions, then those costs should be viewed as having been caused by Royal Mail. We do not, however, accept that a solution that involves ring-fencing of systems is inherently 'gold-plated'.
- 4.28 The level of costs to be recovered and how those costs are recovered (whether by a per-unit charge or otherwise) is beyond the scope of this process, and we would expect them to be the subject of commercial negotiation between the Parties in the first instance. However, in determining the costs, Royal Mail should ensure that the cost causation and cost minimisation principles are followed. We note that Whistl is able to appoint an independent auditor to scrutinise the costs proposed by Royal Mail should Whistl believe that these costs have not been minimised.
- 4.29 We note that our Final Conclusions on Question 2 below would also be relevant to this question if we determined that Whistl could offer a waiver under USPA 5.4 such that USPA 5.3 was fully disapplied. A solution which is not compliant with USPA 5 may then be appropriate, and the costs of that solution should be fair and reasonable and consistent with

the cost recovery principles set out above. However, as set out below, in our view Royal Mail should not be compelled to accept this specific Waiver from Whistl, which would require it to offer an access product outside of the protection of USPA 5.3.

Question 2: Can Whistl consent in writing to the disclosure or use by Royal Mail of its information?

- 4.30 Under this question, we set out the following:
- a) The background to USPA 5 and its application;
 - b) The Parties' positions on how USPA 5.4(b) should be applied in the context of the waiver request;
 - c) Our assessment of whether USPA 5.4(b) allows an access operator to consent in writing to the disclosure or use of its information; and
 - d) Our Final Conclusions.

Background to USPA 5 and its application

- 4.31 USPA 5.3 and 5.4 have been present in a similar form since the first licence conditions in 2001. In the first licence, Condition 10 was the equivalent of USPA 5.
- 4.32 The objective of Condition 10 (now USPA 5) as set out in the 2001 decision document setting Royal Mail (then Consignia)'s licence⁶⁰ was:
- “to ensure that Consignia [Royal Mail] does not obtain any unfair commercial advantage where, for example, it provides to a competing operator access to its postal facilities. The condition requires Consignia to ensure that there is no leakage of relevant information which might unfairly benefit Consignia's operations or those of others, such as agents connected with Consignia.”⁶¹
- 4.33 The consultation document preceding the 2001 decision document further elaborated:
- “This condition ensures fair treatment of postal operators having access to Consignia's facilities by requiring Consignia, where it provides access, to conduct its business in a manner best calculated to avoid it obtaining unfair commercial advantage. In particular it must use its best endeavours not to disclose or use information about the other operator acquired as a result of the 25 access arrangement to benefit any related part of Consignia's business. In addition, Consignia must not discriminate in the terms it provides access for third parties as compared to its own or related businesses.”⁶²
- 4.34 Postcomm, who regulated the postal services industry until 2011, did not mention specifically the purpose of individual parts of Condition 10, including the operation of the disapplication of the requirement to maintain the confidentiality of information, in the 2001 decision document.

⁶⁰ Postcomm, April 2001, License for Consignia PLC: Decision document, (nationalarchives.gov.uk).

⁶¹ Ibid, para 3.26.

⁶² Postcomm, January 2001, License for Consignia PLC: A consultation document and notice, (nationalarchives.gov.uk), para 3.17.

4.35 In 2006, Postcomm considered that Royal Mail had not been compliant with Condition 10 of its licence. In that decision document,⁶³ Postcomm set out further interpretation of Condition 10:

“2.3 For this purpose, paragraph 2 of Condition 10 requires Royal Mail to conduct its business in the manner best calculated to secure that neither it nor other parties obtain an unfair commercial advantage when it (Royal Mail) is providing access to its postal facilities to other persons.

2.4 It is important to recognise that Condition 10(2) may be contravened even where no actual unfair commercial advantage has been obtained by Royal Mail in connection with the provision by it of access to its postal facilities. It is enough if Royal Mail conducts its business in a manner that is not ‘best calculated to secure’ that no unfair commercial advantage is obtained. In the early stages of market development, Postcomm considers it imperative that Royal Mail does not act in a way that could undermine, frustrate or distort the furtherance of customer interests through effective competition.”

4.36 The 2006 decision noted Royal Mail’s practice during the period prior to ring-fencing taking place:

“there was a combination of non-disclosure agreements, briefings and some ring-fencing of accounts.”⁶⁴

4.37 To this end, Postcomm noted, among other things, that Royal Mail should have established a separate Wholesale team,⁶⁵ and that:

“Royal Mail also had inadequate security systems in place at June 2004. For example, at that time, there was no ring-fencing of reports containing DSA transactional and billing information.”⁶⁶

4.38 Postcomm was therefore clear that Royal Mail must have adequate security systems such as ring-fencing of important customer information in order to meet its licence conditions.

4.39 Since 2006, Royal Mail has had separate Retail and Wholesale systems, and in each of Postcomm and Ofcom’s subsequent reviews we have continued to retain USPA 5.3 to reduce the risk of information being shared in a way that gives Royal Mail an unfair competitive advantage.

4.40 In the consultation to our 2022 Review,⁶⁷ we considered the question of retaining USPA 5.3 and concluded that:

“We remain alert to the risk that Royal Mail might use access-related information in order to give it an unfair commercial advantage, and that this could harm effective competition in the bulk letters market. Therefore, we

⁶³ Postcomm, September 2006, Condition 10 of Royal Mail’s Licence: Prohibition against Obtaining Unfair Commercial Advantage – A Complaint about Royal Mail’s Offer of Zonal Downstream Access – Final Report and Decision of the Postal Services [\[ARCHIVED CONTENT\] \(nationalarchives.gov.uk\)](#).

⁶⁴ Ibid, para 4.34.

⁶⁵ Ibid, para 4.8.

⁶⁶ Ibid, para 4.11.

⁶⁷ Ofcom, December 2021, Review of Postal regulation Consultation, [Annex 5-10: Review of postal regulation \(ofcom.org.uk\)](#).

propose to retain a restriction on Royal Mail’s disclosure and use of access-related information.”⁶⁸

4.41 In relation to USPA 5.4, we stated:

“USPA 5.4 contains a number of exemptions to USPA 5.3. These include where Ofcom consents in writing to the disclosure or use of information, or where the person to whom the information relates has consented in writing to disclosure or use”.⁶⁹

4.42 We also noted, in relation to concerns raised by the Mail Competition Forum and Whistl about USPA 5 being used as a barrier in regard to new service requests, that:

“We would, however, be concerned if any regulation imposed by Ofcom were a barrier to innovation. To the extent that stakeholders are suggesting that USPA 5 is a barrier to innovation because it allows Royal Mail to inflate costs (and therefore access charges) for new services, we note that any concerns about unfair or unreasonable pricing could be considered by Ofcom pursuant to USPA 3. We also note that there are a number of carve-outs from the restriction in USPA 5.4, including the ability of access operators to give consent to disclosure/use of information, or for Ofcom to give consent.”⁷⁰

The Parties’ positions on the application of USPA 5 in the context of the Waiver request

Whistl’s submissions

4.43 As set out in Section 3, Whistl considered it was not necessary for Royal Mail to implement a ring-fenced solution to fulfil the NSAR it had requested. It considered that this would result in unnecessary costs and delayed implementation and instead, Royal Mail should be able to rely on the current contractual obligations on confidentiality that existed in a Retail contract that Whistl has with Royal Mail (that includes Tracked 48 services⁷¹) in order to comply with USPA 5.3. In its email to Royal Mail of 2 August 2021, it stated:

“Royal Mail have willingly entered into a contract that ensures a very high degree of confidentiality for the data provided by us on tracked services for parcels, which we believe is at least as good (if not better) than the safeguards provided by the Access contracts. Given Royal Mail’s regulatory Access obligations on confidentiality it is reasonable for us to expect that these self same binding obligations can be offered on Large Letters that are tracked and processed with the self-same systems.”

4.44 It further noted that:

“Should Royal Mail decide it necessary to enhance its own security even further to meet its obligations that is a matter for Royal Mail alone and not something we should be expected to pay for.”

⁶⁸ Ibid, para A10.59.

⁶⁹ Ibid, para A10.60.

⁷⁰ Ibid, para A10.55-A10.62.

⁷¹ This is a service that offers delivery within two days and includes tracking of the posted item. It includes both parcels and letters.

4.45 Following Royal Mail's position that it would progress with a ring-fenced solution in order to meet its obligations under USPA 5.3, on 2 September 2021 Whistl offered to formally provide the Waiver in writing. It considered that it would assist Royal Mail in "*feeling more comfortable*" and protect its position. It further stated:

"...it is clearly ridiculous for Royal Mail to incur expense and delay scoping and building IT system safeguards to protect our information, when we are clear that we do not require it to be so protected. If despite this you insist on incurring cost to build safeguards which are unnecessary, any such costs must not form any part of the price of using such a service."

4.46 In a subsequent email to Ofcom on 7 October 2021 requesting guidance on its Waiver offer, Whistl set out its view that if the Waiver offer was effective this would disapply USPA 5.3.

Royal Mail's submissions

4.47 Royal Mail made a number of arguments about why it would not be appropriate for it to consent to the Waiver and provide the solution that Whistl requested. Consistent with its explanations to Whistl, as set out in Section 3 and in its Submission and RFI Response to Ofcom,⁷² it explained that in its view:

- a) USPA 5.4(b) is not a mechanism for an access operator to effectively require Royal Mail Wholesale to provide an access service on an ongoing basis outside of the USPA 5 ring-fence. Due to the accounting separation of the Wholesale and Retail units, Royal Mail would not be able to make use of Retail front end billing systems as all access services are recorded and invoiced through the access business ledgers. Therefore, it is not practicable or feasible for one to be created through the retail finance systems. In order to provide the service that Whistl requested, it would have had to be a pure Retail service with everything going through Retail. Royal Mail Wholesale did offer to put Whistl in touch with relevant colleagues in Retail to explore a pure Retail option, but Whistl did not take this up.
- b) Royal Mail would not be able to prevent employees in its Retail business from having access to the scanning data for these parcels as it would be freely available under the Retail IT systems and would allow Retail employees to understand granular detail about Whistl's activities. This is contrary to the USPA 5 obligation and would significantly undermine its stringent compliance processes and procedures designed to avoid breaching USPA 5.
- c) It would cause significant confusion for both Wholesale and Retail employees if some Wholesale information was subject to the USPA 5 ring-fence whereas other information could exist outside the ring-fence.
- d) If the service goes ahead, Royal Mail would need to make it available to all access customers and it would need a general consent from all operators before designing the service and making it generally available due to the risk of discriminating against those who are unwilling to provide consent.

4.48 Royal Mail made a number of other points about the wider market implications of providing this type of access service outside of the ring-fence:

- a) If Royal Mail was required to provide this type of service outside of the ring-fence, yet it determined that it was still appropriate to implement a USPA 5.3 compliant service and

⁷² Royal Mail, 29 March 2023, Initial comments in relation to the Dispute Resolution proceedings.

absorb the costs itself, this would have a material bearing on its future financial position and strategy. The additional costs to Royal Mail would have to be recouped through higher prices elsewhere within the business which would have a negative impact on consumers.

- b) There would also be a negative impact on third party end-to-end parcel operators' incentives to develop services in this area. Access customers currently purchase services from a range of end-to-end operators on a commercial basis and volumes have been growing in recent years. If access customers can make risk-free requests for new parcel services from Royal Mail whenever they wish, this may materially undermine that growth.

Does USPA 5.4(b) allow an access operator to consent in writing to the disclosure or use of its information?

Interpretation of USPA 5.4(b)

- 4.49 USPA 5.4(b) allows access operators to provide consent in writing to disclosure or use of their information as mentioned in USPA 5.3. USPA 5.4(b) does not include further restrictions on the circumstances under which an access operator can consent, for example, whether it can consent on an ongoing basis or just on one discrete occasion.
- 4.50 We note, however, that USPA 5.4(c) sets out specific circumstances where information may be disclosed for the benefit of, or used for the purpose of, a user acting on behalf of the USP. These instances appear to allow for a situation where there is an 'ongoing' disclosure of information to a person or an agent of the USP in order for business operations to continue effectively by the USP.
- 4.51 We therefore disagree with Royal Mail's submission that, mechanically, an access operator cannot consent to waive disclosure or use of its information under USPA 5.4(b), or that it is designed solely for Royal Mail to obtain consent from an access operator for a one-off disclosure of specific information. There is nothing specifically that prevents an access operator from consenting to ongoing disclosure or use of its information by the USP under USPA 5.4(b).
- 4.52 Where an access operator is the one seeking for USPA 5.3 to be disapplied in relation to a specific service, while it is mechanically able to offer such a waiver, offering a waiver does not automatically compel Royal Mail to accept and provide the solution that an access operator requests.

Whether the Waiver would disapply Royal Mail's duties under USPA 5.3

- 4.53 As set out above, we consider an appropriate way for Royal Mail to comply with USPA 5.3 is for it to put in place robust processes and systems, such as the separation of Retail and Wholesale and ring-fencing to protect the information obtained by Royal Mail, in the process of providing access to its network.
- 4.54 We note that by offering a waiver, an access customer is essentially seeking to disapply USPA 5.3 such that Royal Mail is no longer required to use all reasonable endeavours to protect that information from being disclosed or used for its own benefit or purpose or for the benefit or purpose of related persons of the USP.
- 4.55 It appears that, despite Whistl's view that Royal Mail's position would be protected and USPA 5.3 would be disapplied, the primary reason for the Waiver offer was to avoid the costs associated with ring-fencing that Royal Mail considered was necessary to comply with

USPA 5.3 and, that if Royal Mail considered a ring-fenced solution was still necessary even after the waiver had been offered, Royal Mail should bear the costs of ring-fencing instead of Whistl.

- 4.56 Despite seeking a disapplication of USPA 5.3 by offering the Waiver, there is no suggestion from Whistl that it would be content for its information to be disclosed to, or used by Royal Mail, for its own benefit or purpose, or the benefit or purpose of related persons of the USP. For example, in response to Royal Mail’s Gateway 2 proposals, Whistl stated:

“The confidentiality obligations for services provided by Royal Mail in both Retail and Wholesale are provided by the contracts that exist with the posting customer. Royal Mail have willingly entered into a contract that ensures a very high degree of confidentiality for the data provided by us on tracked services for parcels, which we believe is at least as good (if not better) than the safeguards provided by the Access contracts. Given Royal Mails regulatory Access obligations on confidentiality it is reasonable for us to expect that these self same binding obligations can be offered on Large Letters that are tracked and processed with the self-same systems.”⁷³

- 4.57 As set out in Section 3 above, in its correspondence with Royal Mail, Whistl stated that Royal Mail was able to:

“achieve the necessary ring-fencing of information within existing retail systems. We know this to be true as Royal Mail has already agreed to a binding contract in which Royal Mail has agreed to keep all our customer information...in retail systems confidential and shared within Royal Mail only on a ‘need to know’ basis.”⁷⁴

- 4.58 We consider that by offering the Waiver, despite its view that USPA 5.3 would be disapplied, Whistl still expected its information to be treated confidentially through less costly contractual terms rather than by a ring-fenced solution. It therefore appears that Whistl was intending to offer a limited waiver under USPA 5.4.
- 4.59 Offering a waiver does not compel Royal Mail to provide the solution that an access operator requests. In this particular case, and as discussed above, Royal Mail has taken the decision that there are various reasons why it would not be appropriate to provide the solution requested by Whistl and that it is still appropriate for it to provide a ring-fenced solution in order to comply with USPA 5.3 with the costs passed on to Whistl.

Application of a full waiver under USPA 5.4(b)

- 4.60 Our rules and policy intention are clear, in that USPA 5.3 is designed to protect the confidentiality of commercially sensitive information such that Royal Mail does not gain an unfair commercial advantage in providing access to its network.
- 4.61 We would therefore be concerned if access customers used the carve out under USPA 5.4(b) in a way which could undermine access competition by creating an entire access product outside of the protection of USPA 5.3. Each offer of a waiver under USPA 5.4(b) should be assessed on a case-by-case basis, carefully considering the merits of the offer, including the intent of the relevant policy and competition implications of the offer, to determine whether

⁷³ Email from Whistl to Royal Mail dated 2 August 2021.

⁷⁴ Email from Whistl to Royal Mail dated 21 July 2021.

the specific offer disapplies USPA 5.3. Without this assessment, if USPA 5.3 was automatically disapplied, we consider there would be a risk that the regulatory process would be undermined and would likely result in Royal Mail Retail having access to commercially sensitive information that it would not otherwise have, allowing it to gain an unfair competitive advantage that USPA 5.3 is designed to prevent.

- 4.62 As set out above, in general, an access customer can consent to waive disclosure or the use of its information under USPA 5.4(b). However, even if Whistl were to consent to a full waiver in this case, such that USPA 5.3 was disapplied and Whistl's information was disclosed or used for the benefit of or used for the purpose of Royal Mail or related persons, the specific nature of the commercially sensitive information that would be available to Royal Mail Retail on an ongoing basis raises a number of concerns.
- 4.63 Specifically, the type of commercially sensitive information that would likely be available in Royal Mail's Retails systems on an ongoing basis would include:
- a) The ability to identify a posting brand from customer return address and volume of items associated with the return address;
 - b) The volume of items being sent would identify which brands in Whistl's customer base would be priority Retail prospects;
 - c) The date on which items are sent;
 - d) Tracking events showing where and when parcels are in Royal Mail's network;
 - e) Recipient address;
 - f) The size and weight of items being sent; and
 - g) Whether added value service features, such as signature captures, are a priority.⁷⁵
- 4.64 We consider that the potential ongoing disclosure of this type of commercially sensitive information to Royal Mail Retail employees would significantly increase the risk of the information being used inappropriately. Were this to happen, it could create an adverse impact on competition in the wider market, including the market for access, by giving Royal Mail Retail an unfair competitive advantage.
- 4.65 We have also considered the policy and competition implications if other access customers decided they wanted to take up the service. In the event other access customers also offered a waiver and USPA 5.3 was disapplied in relation to multiple access customers, we consider the risk of information being used inappropriately would likely be exacerbated. We would also be concerned if other access customers who wished to have a service where USPA 5.3 continued to apply found themselves at a competitive disadvantage competing against operators using a service where USPA 5.3 has been disapplied.
- 4.66 On this point, we would also note that Ofcom has previously expressed concerns in circumstances where Royal Mail appeared to be offering certain access products that were conditional on access operators agreeing to give up, or reduce, the regulatory protections intended by the specific condition.⁷⁶
- 4.67 We are also mindful that the application of competition law is relevant to the sharing of information between commercial competitors. Notwithstanding our analysis of Ofcom rules and the 2011 Act, the impact on competition and compliance with competition law needs to be considered when parties seek to share confidential business information, even on a

⁷⁵ Royal Mail's RFI Response, question 9.

⁷⁶ Ofcom, March 2017, [Review of the Regulation of Royal Mail](#), para 5.29.

unilateral basis. Should an access operator offer a waiver under USPA 5.4, both the access operator and Royal Mail would need to consider carefully if the arrangements proposed were compliant with competition law.

- 4.68 We are therefore concerned that if USPA 5.3 was fully disapplied in this specific case, it would be contrary to our rules and policy intention and could undermine access competition in the market by allowing Royal Mail to gain an unfair competitive advantage that USPA 5.3 is designed to prevent. This would not only impact Royal Mail and Whistl, but also other current and potential access operators as well as customers.

Ofcom's Final Conclusions on the matters in dispute

- 4.69 We conclude that USPA 5.3 continues to apply in the context of providing the service requested.
- 4.70 In this specific case, for the reasons set out above, we consider Whistl's Waiver offer to be limited only to the disclosure of its information rather than its use and therefore there hasn't been a full disapplication of USPA 5.3. In light of this, we consider there is a justifiable concern from Royal Mail that were it to provide the service that Whistl has requested without ring-fencing of the commercially sensitive information, this would pose a significant risk to the confidentiality of that information, its potential use by Royal Mail Retail and the potential impacts on competition and it is reasonable for it to have concerns that it would not be taking reasonable endeavours to comply with USPA 5.3.
- 4.71 Even if it were the case that Whistl offered a full waiver and consented to not only the disclosure of its information but also its use, as discussed above at paragraphs 4.31 to 4.42, we have to take account of the policy intent of the relevant rules and the wider competition implications in relation to the specific NSAR. We consider in this specific case, the risks to competition and the potential for the regulatory regime to be undermined as a result of disapplying USPA 5.3 are significant.
- 4.72 Consequently, we consider it was appropriate for Royal Mail to ensure it was satisfied that any solution it provided to Whistl complied with USPA 5.3 and that it was able to recover the costs from Whistl accordingly.
- 4.73 We emphasise that our Final Conclusions are made only in the context of the specific NSAR made by Whistl. In the future, there may be scenarios where an access operator consents to a waiver under USPA 5.4(b) such that it is appropriate that USPA 5.3 is disapplied. On that basis, despite this Final Conclusion, it is important for Royal Mail to treat any offers it receives under USPA 5.4(b) seriously, carefully considering the merits of the offer, including the intent of the relevant policy and competition implications of the offer before taking any decisions on whether to accept or reject the offer.

Assessment of our conclusions against Ofcom's statutory duties

- 4.74 In reaching our Final Conclusions, we have carefully considered our general duties in section 3 of the 2003 Act. We consider that our Final Conclusions are consistent with these regulatory objectives.
- 4.75 In determining the question of recovering costs incurred to ensure Royal Mail's compliance with its regulatory requirements under the USPA Conditions, we have carefully considered our principal duty to further the interests of consumers (s. 3(1)(b) 2003 Act), where appropriate by having regard to the interests of those consumers in respect of choice, price, quality of service, and value for money (s. 3(5)), as well as the potential effects on other

competitors in the market, and thus the effect on competition (s. 3(1)(b)). We have also considered the potential impacts of costs recovery on innovation in the market for postal services, and have carefully considered Whistl's representations in this regard. We consider that our Final Conclusions accord with these duties by allowing Royal Mail to pass on reasonable costs to access operators, whilst ensuring unnecessary or disproportionate costs are not passed on to that access operator.

- 4.76 In addition, as noted in our Final Conclusions, we consider that USPA 5.3 serves important policy and competition objectives, i.e. to protect the confidentiality of access operators' commercially sensitive information and prevent Royal Mail from gaining an unfair advantage through the improper use or disclosure of this information. We consider our Final Conclusions are consistent with these objectives and assist in securing our principal duty to further the interests of consumers, by protecting competition in the market for postal services (section 3(1)(b) of the 2003 Act).
- 4.77 In reaching our Final Conclusions, we have kept in mind our duty under section 3(3)(a) of the 2003 Act to ensure that our regulatory activities are, among other things, transparent, accountable, proportionate, and targeted only at cases where action is needed. In particular, this document sets out the Parties' arguments and the reasoning that underpins our conclusions, as well as Royal Mail's response to our Provisional Conclusions and our response.⁷⁷ We consider that these Final Conclusions are consistent with previous statements we have made in relation to USPA 5.
- 4.78 Whilst the Dispute relates to whether a USP can pass on costs for complying with USPA 5.3 and the application of USPA 5.4, which is of relevance to current and future access operators, our Final Conclusions are based on the specific facts of the Dispute. Any future cases which raise similar issues would need to be assessed on their own specific facts.

Final determination

- 4.79 As in our Provisional Conclusions, we do not believe it is necessary to issue a final determination in this case. We consider that the rights and obligations of the parties are already clearly set out in the USPA Conditions, as per our analysis above.

⁷⁷ Whistl did not respond to our Provisional Conclusions.

A1 Responses to the Provisional Conclusions and our response

- A1.1 We received one response to the Provisional Conclusions from Royal Mail. A non-confidential version of the response is available on [Ofcom's website](#). Whistl confirmed in an email to Ofcom that it has decided to accept the Provisional Conclusions without further representations or comments.⁷⁸
- A1.2 Royal Mail broadly accepted the Provisional Conclusions and agreed with Ofcom's position on the two questions considered.
- A1.3 We summarise three main observations made by Royal Mail below and set out our views that these observations do not impact our Provisional Conclusions.

Observation one: Ofcom should not have accepted Whistl's request for dispute resolution proceedings

Royal Mail's submissions

- A1.4 Royal Mail argued that it was not appropriate for Ofcom to initiate the dispute resolution proceedings because, in its view, Whistl made no attempt to negotiate with Royal Mail after Royal Mail made its initial offer. In particular, Royal Mail disagreed with our description of paragraphs 3.6 to 3.33 of the Provisional Conclusions as being a "Negotiations process". Instead, Royal Mail considered that rather than being a negotiations process, it was its response and engagement with Whistl regarding its New Service Request as per its eight-stage process for NSARs (the "NSAR Process").⁷⁹ As it had only reached stage 4 of the eight-stage process at the point of the initial offer, it expected that Parties would then both enter into good faith negotiations.
- A1.5 Royal Mail also stated that it is concerned that "*Ofcom initiating these proceedings without Whistl having engaged in good faith negotiations sets a dangerous precedent*".

Ofcom's response

- A1.6 Paragraph 4.6 of our [Dispute Resolution Guidelines](#) states that:
- "Submissions must include evidence which shows that the Parties are in dispute. Ofcom would also expect to see evidence that the Parties have made reasonable endeavours to enter into good faith negotiations in order to seek to resolve their differences before referring the matter to Ofcom."*
- A1.7 As set out in section 3, Whistl submitted its initial NSAR in July 2021, and was in frequent correspondence with Royal Mail about the request between then and the end of 2021. Whistl did not raise a draft dispute with Ofcom until April 2022 and the final dispute was not submitted until October 2022.

⁷⁸ Whistl emailed Ofcom on 14 September 2023.

⁷⁹ <https://www.royalmailwholesale.com/mint-project/uploads/831401231.pdf>

- A1.8 From late July 2021, it was clear that Whistl and Royal Mail had very divergent expectations about what the new service should look like and the magnitude of the costs associated with providing the request, and that the issue which was considered in this dispute was a fundamental part of that.
- A1.9 We also do not agree with Royal Mail’s view that because it and Whistl had only reached stage four of Royal Mail’s NSAR Process that this meant negotiations had not yet been entered into in good faith or had not been exhausted and that our summary of this period as being a “Negotiations process” was wrong. The correspondence up until this point clearly demonstrates that negotiations were taking place and after receiving the initial offer from Royal Mail, this was confirmation to Whistl that any further negotiations would not be successful.
- A1.10 We therefore disagree with Royal Mail’s assertion that Ofcom should not have accepted Whistl’s request for dispute resolution proceedings. It is clear that the Parties had made reasonable endeavours to enter into good faith negotiations between July and December 2021 before the dispute was referred to Ofcom.

Observation two: Ofcom has not given sufficient recognition to the market context for the NSAR

Royal Mail’s submissions

- A1.11 Royal Mail argued that when illustrating the market context, Ofcom did not include sufficient context regarding the fact that Whistl was seeking tracking for a parcel product, not a letter product, which fits within the technical weight and size dimensions for a large letter.

Ofcom’s response

- A1.12 Section 2 of our Provisional Conclusions sets out the background and legal framework relating to the Dispute. As set out in Section 2, access products pertaining to large letters are subject to access regulation which does not apply to parcel products. As such, when setting out the background to Whistl’s NSAR, it is the regulation around large letters which is relevant and important to the nature of the Dispute, even if Royal Mail believes that there is some substitutability between regulated large letter access products and parcel access products.
- A1.13 As set out in our 2022 review, we continue to believe that it is important that Royal Mail is required to provide access to third party operators for the supply of D+2 Letters and Large Letters and D+5 Letters, given Royal Mail’s postal network is key to supporting access competition in the letters market, and we believe that access remains important to promote competition. We therefore have decided to maintain the requirement for Royal Mail to provide access to its network for these services.

Observation three: Concerns with Ofcom's interpretation of USPA 5.4(b)

Royal Mail's submissions

- A1.14 Royal Mail said that Ofcom "may or may not be right in its view that USPA 5.4(b) can allow an access operator to give a waiver for ongoing disclosure". However, Royal Mail did not agree that USPA 5.4(c) has any bearing, or provides any meaningful insight, into how USPA 5.4(b) should be interpreted. It argued that the arrangements that Royal Mail has with its agents regarding assistance in providing access services is entirely different to a situation where Royal Mail might be seeking permission from an access operator for disclosure.
- A1.15 Royal Mail stated that a more important question is whether USPA 5.4(b) is a mechanism which allows Royal Mail to seek the permission of an access operator for disclosure of its information outside the ring-fence or is a mechanism whereby an access operator can effectively force Royal Mail to provide a service outside of the ring-fence. Royal Mail considers Ofcom appears to be confused on this point noting that at paragraphs 4.50 and 4.58 of the Provisional Conclusions Ofcom confirms an offer of a waiver by an access operator does not compel Royal Mail to provide the solution requested yet at paragraph 4.72 Ofcom takes the position that while in this specific case Royal Mail is not compelled to accept the offer, it may be compelled to accept the offer in other circumstances.
- A1.16 Royal Mail then sets out its view that while there may be circumstances where it can legitimately seek the permission of access operators for the disclosure of information outside the ring-fence (which is the purpose of USPA 5.4(b) it should never be used to force Royal Mail to provide a service on an ongoing basis outside of its ring-fenced business.

Ofcom's response

- A1.17 We agree with Royal Mail that there are differences between a situation where Royal Mail has an arrangement with its agents compared to a situation where it is seeking permission from an access operator for disclosure or an access operator is seeking permission from Royal Mail.
- A1.18 Our reference to USPA 5.4(c) is to note that there are circumstances under which ongoing disclosures to access information can be given in the context of the USP to a person or an agent of the USP in order for business operations to continue effectively. While the merits of ongoing disclosures from an access operator to Royal Mail are likely to be highly dependent on the details of that case, our view is that there is nothing specifically that prevents an access operator from consenting to ongoing disclosure or use of its information by the USP under USPA 5.4(b).
- A1.19 We do not agree with Royal Mail's view that we are confused on our interpretation of USPA 5.4 (b). Our Provisional Conclusions clearly set out the reasons why we consider it was not appropriate for Whistl's Waiver offer to compel Royal Mail to provide the solution requested in this specific case. However, as set out in paragraph 4.72 of our Provisional Conclusions, we consider there may be scenarios where an access operator consents to a waiver under USPA 5.4(b) such that it is appropriate that USPA 5.3 is disapplied, and we expect Royal Mail to treat any offers it receives under USPA 5.4(b) seriously, carefully considering the merits of the offer, including the intent of the relevant policy and competition implications of the offer before taking any decisions on whether to accept or reject the offer.

A1.20 This means that in some circumstances, the fair and reasonable option for Royal Mail may be for it to provide a service outside the ring-fence, potentially on an ongoing basis, but that this will depend on the circumstances of the case. We do not consider that this approach creates any uncertainty for Royal Mail.

Conclusion

A1.21 We disagree with the three observations made by Royal Mail in its response to the Provisional Conclusions. We have therefore not changed our decision when making our final conclusions.