

**CW/01267/02/23 - Dispute between Whistl and Royal Mail
in relation to a new service request for a tracked large letter service**

Royal Mail's Response to the Provisional Conclusions

1. Introduction and Executive Summary

In this paper RM sets out its views on Ofcom's Provisional Conclusions of 13 September 2023 in the above Access Dispute Proceedings. In short, RM broadly welcomes Ofcom's Provisional Conclusions and agrees with its position on the two questions which are under consideration, namely that:

- (i) RM can pass on the costs of complying with its obligations under access condition USPA 5.3 to Whistl; and
- (ii) in the specific context of providing the service requested, USPA 5.3 continues to apply, and accordingly it was therefore appropriate and legitimate that RM did not accede to Whistl's request, via its offer of a written waiver under USPA 5.4(b), to disregard its USPA 5.3 obligations and provide the service outside of its ringfenced access business.

However, whilst we agree with and welcome Ofcom's broad conclusions, we have a few specific observations on certain passages in the decision document which we believe are nevertheless relevant and important considerations. In particular:

- We do not agree that it was appropriate for Ofcom to initiate the dispute resolution proceedings – Whistl made no attempt to negotiate with us after we issued our initial offer. As a consequence, this will encourage an Access Customer to refer to Ofcom any matter where it disagrees with RM, even at an early stage in the discussions, rather than engage in genuine commercial negotiations.
- We do not consider that Ofcom has provided an accurate description in the Provisional Conclusions to the market context for the request – namely that Whistl is using the mandated access regime for letters to seek access for a parcel-type service.
- We are concerned with Ofcom's interpretation of USPA 5.4(b). In particular (a) we do not agree that the USPA 5.4(c) exceptions for RM's agents has any bearing on whether a USPA 5.4(b) waiver can be for one off or ongoing disclosures and (b) Ofcom appears to suggest that there could be circumstances where an access operator could use a USPA 5.4(b) waiver to compel RM to provide a service outside of its access business.

We also set out a few suggested corrections for factual accuracy.

2. Ofcom should not have accepted Whistl's request for dispute resolution proceedings

At paragraph 2.30(b) Ofcom indicates that it was "*satisfied that there was an "access dispute" within the relevant meaning of the PSA 2011 because Whistl contends (and RM disputes) that the terms on which RM proposes to provide access are not "fair and reasonable"*". However, we do not believe we had at any point reached that impasse. As explained in RM's Initial Comments dated 29 March 2023, the Indicative Offer we made to Whistl in November 2021 was fair and reasonable and, at the very minimum, a logical starting point for negotiations.

In this regard, we disagree with Ofcom's summary of the process and in particular the title which it gives to Paragraphs 3.6-3.33 of the Provisional Conclusions, namely the "*Negotiations process*". This part of the process was not a negotiation. Rather, it was our response and engagement with Whistl regarding its new Access Service Request. In particular, we followed the process set out in our published eight-stage Process for New Service Requests¹, namely:

- Stage 1: Initiation of request
- Stage 2: Concept design
- Stage 3: Initial scoping
- Stage 4: Detailed scoping
- Stage 5: Review Heads of Terms and prices
- Stage 6: Product development
- Stage 7: Product testing
- Stage 8: Product announced

We had reached the end of Stage 4 when we issued our formal offer on 8 November 2021 and the next stage was for the parties after that point to enter into good faith negotiations. In particular, our processes indicate "*Discussion between customer and Royal Mail on commercial, operational and systems aspects of the proposal*". Unfortunately, instead of continuing with the New Service Request Process, and indeed following Ofcom's own guidelines,² by engaging with RM in good faith negotiations, Whistl immediately complained to Ofcom and successfully managed to convince Ofcom to initiate these dispute resolution proceedings.

This is not just a technical point. We are concerned that Whistl and other access customers may now use this tactic of immediately complaining to Ofcom and requesting that it start dispute resolution proceedings to their advantage, instead of engaging in meaningful negotiations in relation to service requests, in direct contravention of Ofcom's own guidance. Whilst we accept that Ofcom has statutory powers and plays an important role in resolving access disputes, we are concerned that Ofcom initiating these proceedings without Whistl having engaged in good faith negotiations sets a dangerous precedent.

3. Ofcom has not given sufficient recognition to the market context for the request

Ofcom sets out the factual background for its Provisional Conclusions in Section 2 and in particular paragraphs 2.2 to 2.6. In this section, Ofcom seeks to illustrate the market context for Whistl's new service request for tracking for large letters, namely that it was made in the context of the "*bulk letters market*" (see for instance paragraph 2). However, this misses the point. Whistl was seeking tracking for a parcel product, not a letter product, albeit a parcel product that fits within the technical weight and size dimensions for a large letter. This is a point Whistl themselves concedes, as Ofcom points out (and then corrects) in the Provisional Conclusions. Paragraph 3.4 of the Provisional Conclusions highlights that Whistl wanted a tracked parcel service as part of the new service request.³

¹ See <https://www.royalmailwholesale.com/mint-project/uploads/831401231.pdf>.

² See paragraph 2.4 of Ofcom's Guidelines on Dispute Resolution Proceedings where Ofcom indicates that it expects the Parties to a dispute to take reasonable endeavours to engage in good faith negotiations to resolve their differences themselves, before referring a dispute to Ofcom.

³ "*The key service features will mirror the service features of T48 in every respect, save that the parcels 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...*". Footnote 39 of the Provisional Conclusions states "*While Whistl mentioned parcels here, the NSAR specifically related to large letters.*"

Again, this is not just a technical point. We provided Ofcom with detailed submissions, as part of our responses to Ofcom’s 2022 Review of Postal Regulation (including a report from Oxera), on why we consider that there is now effective competition from end-to-end operators for all bulk parcel services, including down to the very smallest parcels, which fit within the dimensions of a large letter.

Whilst Ofcom has decided in its 2022 Review of Postal Regulation Decision not to carve out General Large Letters from the USP Access Condition, Ofcom did more generally identify developing competition for small parcels. Moreover, Ofcom’s rationale for not carving out General Large Letters from the Access Condition appears to be because there are certain end-customers who are using General Large Letters in Access for items other than “e-commerce goods” and which in many cases are often complementary to existing bulk letter services (see paragraphs 8.56 to 8.65 of the Ofcom Decision Document).

We would expect that the vast majority of the General Large Letters for which Whistl would wish to apply tracking is for “e-commerce goods”, and not these complementary or ancillary services. Indeed, Whistl has been explicit about this. Moreover, Whistl could obtain tracked parcel services, including for parcels within the dimensions of a large letter, from any of the other end-to-end parcel operators in the UK, including Evri, Yodel and DPD. We understand Whistl already does have such arrangements in place.⁴

In short, we consider that this is all relevant and important context, which supports Ofcom’s Provisional Conclusion that it was entirely fair and reasonable for us to be able to seek to recover our legitimate IT development costs.

4. Concerns with Ofcom’s interpretation of USPA 5.4(b)

Ofcom indicates at paragraph 4.50 that it disagrees with RM’s view that USPA 5.4(b) is primarily designed for a waiver of “one-off” disclosures, rather than a mechanism for Access Operators to require RM Wholesale to provide services outside of its ringfence. Ofcom bases its reasoning here on the fact that the exception in USPA 5.4(c), which allows disclosure of wholesale information to an RM agent, which appears to allow for a situation where this an “ongoing” disclosure of information.

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 (although we would still contend that it is primarily designed for one-off disclosures). However, we do not agree that USPA 5.4(c) has any bearing, or provides any meaningful insight, into how USPA 5.4(b) should be interpreted. The arrangements RM has with its agents regarding assistance in providing access services is entirely different to a situation where RM might be seeking permission from an access operator for disclosure. In the same way that the exception in USPA5.4(a) (Ofcom consenting in writing to a disclosure) has any bearing. Ofcom should be very careful in drawing inferences of this kind.

The more important point, however, is whether USPA 5.4(b) is a mechanism which allows RM 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 RM to provide a service outside of the ring-fence. Ofcom appears confused on this point.

⁴ See, for instance, Slide 3 of Whistl’s April 2022 submission, fourth bullet, where Whistl sets out how it sends its “eCommerce large letters (GLL) and parcels”, where it includes a range of options, including RM’s Access services, RM Retail, and “a range of other carriers for parcels traffic”. This request for tracking in Access is clearly for “e-commerce goods”.

In paragraph 4.50, Ofcom says “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 RM to accept and provide the solution that an access operator requests”. We agree with this statement. Similarly, Ofcom says at 4.58 that “offering a waiver does not compel RM to provide the solution that an access operator requests”.

However, later, in paragraph 4.72, Ofcom indicates that it makes its Provisional Conclusions in the context of this specific case, and that “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 Provisional Conclusion, it is important for RM to treat any offers it receives under USPA 5.4(b) seriously and 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.” This suggests that Ofcom considers there may well be circumstances where an access operator could effectively compel RM to disregard USPA 5.3 against its wishes, but this is not one of those circumstances. This is unhelpful – and creates significant uncertainty for RM going forward. The Access Condition places very significant obligations and restrictions on RM. Whilst there may be circumstances where RM can legitimately seek the permission of access operators for the disclosure of information outside the ring-fence – which is the purpose of the USPA 5.4(b) waiver – it should never be allowed to be used as a tool to force RM to have to provide a service on an ongoing basis outside of its ring-fenced business.

5. Factual corrections

- In *Figure 1: Postal services value chain, including end-to-end and access mail*, the “Upstream” arrow should be extended to cover the ‘Trunking network’ as this is part of the upstream value chain.
- Paragraph 2.17(b) should be amended to read “*D+5 Letter and later than D+5 Letter services...*” as USPA 1.2 does not apply to Large Letters.

6. Concluding remarks

For the reasons explained above, we consider that Ofcom should reflect in its decision document setting out its final determination of these dispute resolution proceedings that:

- (i) The Guidelines on Dispute Resolution Proceedings should be followed by all parties, particularly regarding paragraph 2.4 by making it clear that it will not initiate dispute resolution proceedings until the parties can demonstrate that they have first attempted to resolve the dispute through meaningful, good faith negotiations.
- (ii) There is now effective competition from end-to-end parcel operators for all bulk parcel service, including those within the dimensions of a large letter, and that within that context it was entirely appropriate and reasonable for RM to seek to ensure that it was not left with stranded costs in adapting its IT systems in order to provide Whistl with a tracking service in access.
- (iii) Although, under USPA 5.4(b), there is nothing preventing an access operator for consenting to the ongoing disclosure or use of its information by RM, it is not a mechanism for an access operator to effectively require RM Wholesale to provide an access service on an ongoing basis outside of the USPA 5 ring-fence.

Royal Mail Group Limited
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