



# Postal Services Price Control Appeals: Competition Commission Guide

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## Contents

	<i>Page</i>
Introduction .....	4
Background.....	4
Subject matter of appeal .....	4
Making an appeal to the CC.....	5
The CC's determination .....	6

## Introduction

1. This brief Guide has been prepared to assist participants involved in postal services price control appeals under the Postal Services Act 2011 (the Act). In particular it draws attention to provisions of the Act relevant to such appeals. It may be revised and supplemented from time to time and as the Competition Commission (CC) gains experience of such appeals. Comments in this Guide are not intended to bind the CC in its consideration of particular cases.
2. The CC has published procedural rules, the *Competition Commission Postal Services Price Control Appeals Rules (CC16)*, to govern these appeals.<sup>1</sup> This Guide should be read in conjunction with the Act and those Rules.
3. In every case, the CC will look for a high degree of cooperation from participants. The CC expects appellants to be realistic in drafting their grounds of appeal and all participants to present their submissions clearly.
4. This guidance does not contain details of all the provisions of the Acts and Rules relevant to appeals and is not intended to modify or constrain the full application of those provisions to particular cases.

## Background

5. Under the Act, the Office of Communications (Ofcom) can impose regulatory conditions on the provision of postal services by postal operators.<sup>2</sup> It may designate one or more postal operators as universal service providers<sup>3</sup> (USP) and impose a designated USP condition on them.<sup>4</sup> Ofcom's power to do so is subject to a primary duty to carry out its functions in relation to postal services in a way that it considers will secure the provision of a universal postal service.<sup>5</sup>
6. Where, in carrying out these functions, Ofcom takes a 'price control decision',<sup>6</sup> a person affected by the decision who considers that Ofcom has made a material error may appeal to the CC.

## Subject matter of appeal

7. Ofcom can take two kinds of price control decisions which can be appealed to the CC:
  - (a) a decision imposing a condition on a USP that makes provision as to the tariffs that are to be used for determining prices in accordance with a universal postal service or part of a universal postal service;<sup>7</sup>
  - (b) a decision (other than under Part 2 of Schedule 3 to the Act<sup>8</sup>) as to prices that may be charged for the giving of access under an 'access condition'.<sup>9</sup>

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<sup>1</sup> Under [section 60\(1\)](#) of the Act.

<sup>2</sup> [Section 28\(1\)](#) of the Act. 'Postal services' and 'Postal operator' are defined for this purpose in [section 27](#) of the Act.

<sup>3</sup> Under [section 35](#) of the Act.

<sup>4</sup> Under [section 36](#) of the Act.

<sup>5</sup> See [section 29](#) of the Act.

<sup>6</sup> Defined in [section 59\(13\)](#) of the Act.

<sup>7</sup> See [section 36\(4\)](#) of the Act.

<sup>8</sup> Part 2 of Schedule 3 of the Act is concerned with the resolution of access disputes by Ofcom, that is disputes between postal operators, 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. Decisions by Ofcom in relation to such disputes cannot be appealed to the CC.

<sup>9</sup> Under [section 65\(1\)](#) of the Act, an 'access condition' may be either a USP access condition (as defined by [section 38](#) of the Act) or a general access condition (as defined by [section 50](#) of the Act).

## Making an appeal to the CC

8. An appeal can only be made by a person affected by a price control decision<sup>10</sup> and can only be brought where a person contends that Ofcom has made a material error.<sup>11</sup> The Act does not state what can constitute a 'material error'. However, the CC notes that other appeals regimes relating to price controls allow for appeals on the basis that a regulator has made errors of fact, law, or in the exercise of its statutory discretion.<sup>12</sup>
9. The Act provides that to make an appeal, a person affected by a price control decision must send a notice of appeal to Ofcom, within the period of two months beginning with the day on which the decision is published.<sup>13</sup>
10. The notice of appeal must set out the grounds of appeal in sufficient detail to indicate the error (or errors) which the appellant contends Ofcom made.<sup>14</sup> Rule 5 sets out what information needs to be included in the notice of appeal. The CC encourages parties to bring forward their full case at the outset. Rule 5 also provides that the notice of appeal must be accompanied by any written evidence in the possession or control of the appellant which the appellant wishes to adduce in support of the appeal, a copy of the decision to be appealed and particulars of any other documents that the appellant contends the CC should have regard to in determining the appeal.<sup>15</sup>
11. Where an appeal has been made by a person affected by a price control decision, Ofcom must refer the appeal to the CC as soon as reasonably practicable after it is made.<sup>16</sup>
12. To refer the appeal to the CC, Ofcom must send to the CC:<sup>17</sup>
  - (a) the notice of appeal;
  - (b) any documents that accompanied the notice of appeal; and
  - (c) Ofcom's response to the notice of appeal, including:
    - (i) its arguments and representations in relation to the matters raised in the notice of appeal and the accompanying documents provided by the appellant; and
    - (ii) any documents or information to which Ofcom contends the CC should have regard in determining the appeal.
13. The making of an appeal does not suspend the effect of Ofcom's price control decision.<sup>18</sup>

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<sup>10</sup> Section 59(1) of the Act.

<sup>11</sup> Section 59(7) of the Act.

<sup>12</sup> See, for example, section 192 of the Communications Act 2003 and section 11E of the Electricity Act 1989.

<sup>13</sup> Section 59(1) of the Act.

<sup>14</sup> Section 59(2) of the Act.

<sup>15</sup> Rule 5.3.

<sup>16</sup> Section 59(3) of the Act.

<sup>17</sup> Rule 6.1.

<sup>18</sup> Section 59(4) of the Act.

## The CC's determination

14. The Act provides that the CC must determine an appeal before the end of:
  - (a) the period of four months beginning with the day on which Ofcom refers the appeal to it; or
  - (b) if the decision appealed against is not an initial price control decision<sup>19</sup> and the CC considers that the circumstances of the case are exceptional, the period of six months beginning with that day.<sup>20</sup>
15. On determining the appeal, the CC must dismiss the appeal, or if it considers that Ofcom made a material error, the CC may:<sup>21</sup>
  - (a) allow the appeal and make its own decision on the subject matter of the appeal; or
  - (b) quash the whole or part of the price control decision to which the appeal relates (in which case it may refer the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with the ruling of the CC<sup>22</sup>).
16. The Act provides that the CC may investigate any matter or do any other thing for the purpose of deciding what action to take.<sup>23</sup>
17. Information that is obtained as a result of Part 3 of the Act and that relates to the affairs of an individual or to a particular business must not be disclosed during the lifetime of the individual or so long as the business is carried on, except as provided by [section 56](#) of the Act. That section permits such disclosure, in particular:
  - (a) with the consent of the individual or the person for the time being carrying on the business, or
  - (b) for the purpose of facilitating the carrying out by the CC of its functions under the Act.

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<sup>19</sup> An 'initial price control decision' is defined in [section 59\(13\)](#) of the Act.

<sup>20</sup> In such cases the CC must, before the end of the period of four months beginning with the day on which Ofcom refers the appeal to it, publish its reasons for considering that the circumstances of the case are exceptional ([section 59\(5\)](#) of the Act).

<sup>21</sup> [Section 59\(6\)–\(8\)](#) of the Act.

<sup>22</sup> The CC may not direct Ofcom to take any action that it would not otherwise have the power to take in relation to the decision ([section 59\(9\)](#) of the Act).

<sup>23</sup> [Section 59\(11\)](#) of the Act. The Postal Services (Appeals to the Competition Commission) (Investigations and Extension of Time Limits) Order 2011 (SI 2011/2749) modifies and applies sections 109 to 117 of the Enterprise Act 2002 to appeals made to the CC under [section 59](#) of the Act and also gives the CC the power to extend the time for determining an appeal where information or witnesses required under [section 109](#) of that Act have not been produced.



