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Case No: CO/3607/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2016

Before :

MR JUSTICE SOOLE

Between :

THE QUEEN on the application of
DHL INTERNATIONAL (UK) LIMITED ('DHL')

Claimant

- and -

THE OFFICE OF COMMUNICATIONS ('Ofcom')

Defendant

Graham Read QC and Ishaani Shrivastava (instructed by Nicholas Sandison, DHL Legal Director) for the Claimant

Dinah Rose QC and Jessica Boyd (instructed by Jess Hinings, Ofcom Legal Adviser) for the Defendant

Hearing dates: 25, 26, 29 February 2016

Approved Judgment

Mr Justice Soole :

1. The Claimant, DHL International (UK) Limited ('DHL'), is an international door-to-door courier of goods. The Defendant, Office of Communications ('Ofcom'), is the regulator of postal services under the Postal Services Act 2011 ('the 2011 Act'). On 28 May 2015 Ofcom served an Information Request ('IR') on DHL purportedly pursuant to its powers under the 2011 Act. The IR in particular sought information about DHL's parcels business and on the basis that DHL is a 'postal operator' within the meaning of the 2011 Act.
2. By this claim DHL seeks declaratory and other relief on the basis that the IR is unlawful. The essential grounds are that DHL is not a 'postal operator'; and that in any event the IR is a nullity or disproportionate in its requirements. Ofcom disputes these contentions. If DHL is not a 'postal operator' it submits that it was entitled and did alternatively serve the IR on DHL as a 'person' who was not a postal operator. On 24 September 2015 Kerr J granted DHL permission to seek judicial review on all grounds.
3. In the course of the proceedings both parties have elaborated their cases in various ways. Ofcom submitted that DHL's further arguments went outside the scope of the grant of permission and were unarguable. I disagree that the new arguments go outside the scope but would in any event have granted permission if necessary.
4. I will deal in turn with the issues of :
 - (1) whether DHL is a postal operator;
 - (2) whether the IR was alternatively served on DHL as another 'person';
 - (3) whether the IR is a nullity;
 - (4) whether the IR is disproportionate in its requirements.

Postal operator

5. Part 3 of the 2011 Act governs the regulation of postal services. Ofcom is the regulator. By section 55 and Schedule 8 Part 1 there are set out "Requirements to provide information to OFCOM". By paragraph 1 of Schedule 8 :

"(1) OFCOM may require a person falling within sub-paragraph (2) to provide them with all such information as they consider necessary for the purpose of carrying out any of their functions in relation to postal services.(2) The persons within this sub-paragraph are – (a) a person who is, or has been, a postal operator, (b) a person who provides, or has provided, access points or other facilities for use in connection with a postal service, and (c) a person not falling within paragraph (a) or (b) who appears to OFCOM to have information required by them for the purpose of carrying out any of their functions in relation to postal services..."
6. Ofcom contends that the IR was served on DHL as a 'postal operator' within para. 1(2)(a), alternatively as a 'person' within para.1(2)(c).

7. By section 27 :

‘(1) “Postal services” means – (a) the service of conveying postal packets from one place to another by post, (b) the incidental services of receiving, collecting, sorting and delivering postal packets, and (c) any other service which relates to, and is provided in conjunction with, any service within paragraph (a) or (b).

(2) “Postal packet” means a letter, parcel, packet or other article transmissible by post.

(3) “Postal operator” means 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.

(4)...

8. The question is whether DHL is a postal operator within the meaning of s.27(3). At the heart of the issue is the absence of any statutory definition of the phrase “by post” as used in section 27 and elsewhere in the statute. Both parties appeal to the legislative history of the words ‘by post’ in support of their contrasting conclusions. DHL contends for a narrow definition; Ofcom for a broad interpretation.

9. I must first set out DHL’s essential service as described in the witness statements of its Legal Counsel and Recoveries Manager Mr Astan Morarji. DHL commenced the business of international door-to-door couriers in the UK in about 1974. The business is predominantly business to business carriage of international express parcels and freight. The wider DHL group operates in some 220 countries. Its infrastructure includes ownership of over 280 aeroplanes. The request for the service comes from the customer and normally parcels or freight are collected directly from the account customer’s premises or from the sender of the goods. After collection they are taken to a DHL local station and then on to the country’s gateway export clearance. They are then either driven or flown to the import clearance gateway of the inbound country, taken on to the local station within the inbound country and from there delivered to the consignee’s address. The process is reversed when sent from an overseas country for delivery to a specific address in the UK. Although the focus has always been on international door-to-door delivery in the UK and abroad, there has been some domestic business within the UK, in particular between 2003 and 2010. In that year DHL sold its business to another company (Parcel Point Ltd). It now has only a limited domestic business, essentially as an adjunct service for those international customers who on occasions require a purely domestic service. As its business is structured around the transportation of goods by air, even goods conveyed within the UK will pass through DHL’s airport hub. Certain routes within the UK are also via air, e.g. to Scotland.

10. DHL submits that there are five particular features of this business which distinguish it from ‘postal services’ and DHL from a ‘postal operator’. In summary these are its :

(1) Collection from customers’/senders’ premises; rather than delivery by customers to some form of collection point;

- (2) International conveyance of goods ‘end to end’, including the arrangements formalities and regime for international carriage by air; in contrast to Royal Mail’s conveyance of international items to an overseas postal operator for onwards delivery;
- (3) Requirement for full details of the names and address of the consignor;
- (4) Requirement for full details of the items being consigned;
- (5) Packages not affixed with symbols of ‘postage’, i.e. stamps, franked labels or the like.

Legislative history

11. The parties agree that the legislative history of the postal system and the words ‘by post’ has to be considered; but draw opposing conclusions from what it reveals. Before turning to that history, they make some general submissions on statutory construction.
12. DHL places particular reliance on the decision of the House of Lords in Goodes v. East Sussex CC [2000] 1 WLR 1356. In that case the relevant words in the Highways Act 1959 were capable, as a matter of ordinary language, of a meaning which supported the Plaintiff’s case. However that meaning could not be upheld in the light of the legislative history. Thus “...*the context in which the words appear may give them a narrower meaning. It seems to me quite impossible, in construing the Act of 1959, to shut one’s eyes to the fact that it was not a code which sprang fully formed from the legislative head but was built upon centuries of highway law. The provisions of the Act itself invited reference to the earlier law and in some cases were unintelligible without them.*” (per Lord Hoffmann at p.1360H). Mr Read QC argues that the undefined words ‘by post’ in the 2011 Act fall to be interpreted in the context of their repeated use in earlier statutes (notably the Post Office Act 1953) and the postal system as then understood. For Ofcom Ms Rose QC does not question the principle in Goodes; but submits that the legislative history has always demonstrated a broad interpretation of the words ‘by post’.
13. Mr Read also invokes the principle that the law should not be subject to casual change (Halsbury’s Laws 5th ed. Vol.96, para.1138; see e.g. National Assistance Board v. Wilkinson [1952] QB 648 per Devlin J at p.661; also per Lord Goddard CJ at p.659). This is again uncontroversial. Both parties agree that there has been no change in the meaning of the words ‘by post’ since (at least) 1953. The question is what they mean.
14. Ms Rose in turn relies on R (Quintavalle) v. Secretary of State for Health [2003] 2 AC 687 concerning the interpretation of statutes in the light of new circumstances. Lord Bingham said : “*There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of “cruel and unusual punishments” has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.*” (para.9); see also his

citation (para.10) of Lord Wilberforce in Royal College of Nursing v. DHSS [1981] AC 800 at 822.

15. Mr Read's response is that the international door to door service provided by DHL is and always was a cat, rather than a new type of dog. In support of that submission he points to the various features, summarised above, which are said to distinguish DHL's service from the well understood meaning of 'post'.
16. On a first impression there is an instinctive attraction in DHL's arguments. The phrase 'by post' conjures up an immediate picture, at least to someone of my generation, of some classic features of the postal system as performed by the Post Office in the second half of the 20th century (and indeed earlier); notably the pillar box for posting and collections; the post office in major towns for sorting; and delivery by van, bicycle or on foot.
17. However on analysis of the legislative history I am quite persuaded that this impression reflects no more than the image of the Post Office/Royal Mail service (and in particular its monopoly service for letters) as performed at a particular time; and that analysis of the historic legislation demonstrates the much greater breadth of the words 'by post'.
18. As the legislative history is surveyed it is important to keep a steady eye on the distinction between :
 - (1) the overall concept of 'the post' and of the conveyance of items 'by post';
 - (2) historic privileges (and subsequent successive regimes) for the conveyance of certain postal items, in particular letters; and
 - (3) the successive bodies who have enjoyed such privileges or who have enjoyed rights under those subsequent regimes (in particular HM Postmaster General, the Post Office and Royal Mail).
19. By way of background, Ofcom's evidence starts with an historical account derived from the authorised history of Royal Mail (Masters of the Post, Duncan Campbell-Smith (2011)). This explains that the first 'Master of the Posts' was appointed by Henry VIII and that the term 'post' originally referred to staging posts for the bearers of mail. The conveyance of letters by this means became a royal monopoly in the reign of Charles I and 'Post' or 'Post Office' then and thereafter referred to the holder of this monopoly. The monopoly did not extend to the conveyance of parcels. The Royal Mail set up its own parcels business in the 1880s but it was not made operationally distinct from its letters business until the late 1980s.

Post Office Act 1953
20. Moving to the present reign, the parties agree that the first statute which it is necessary to consider in detail is the Post Office Act 1953. This was a consolidating statute, together with some 'corrections and improvements' (see the long title). The material sections replaced very similar provisions in the Post Office Act 1908.

21. By s.1, the Master of the Post Office was HM Postmaster-General (the PMG). By s.2 the PMG was empowered to ‘...*establish such posts and post offices as he thinks expedient, and collect, receive, forward, convey and deliver in such manner as he thinks expedient all postal packets transmitted within or to or from the British postal area or a British postal agency.*’
22. ‘Postal packets’ means “*a letter, postcard, reply postcard, newspaper, printed packet, sample packet, or parcel, and every packet or article transmissible by post, and includes a telegram...*’ ‘Parcel’ “*means any postal packet defined as a parcel by Post Office regulations.*” (s.87(1)).
23. Section 3 then provided for the monopoly in respect of ‘letters’, i.e. for the PMG to have the “*...exclusive privilege of conveying from one place to another, and of performing all the incidental services of receiving, collecting, dispatching and delivering, all letters.*” For this purpose the definition of letters included a packet but not a parcel “*...unless a communication not forming part of a newspaper is contained therein*” (section 3(4)). Thus there remained no monopoly in respect of parcels containing goods alone.
24. Section 4 imposed a criminal offence for breach of the exclusive privilege. Section 5 provided for the PMG to charge postage for the conveyance of postal packets. ‘Postage’ was the duty chargeable for the transmission of postal packets (s.87(1)).
25. Section 87 (2) is an important provision on which both parties rely. The material sub-sections provided that, for the purposes of the Act :

“(a) *a postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to any post office to the time of its being delivered to the addressee;*

(b) *the delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post or to an officer of the Post Office to be dealt with in the course of his duty shall be a delivery to a post office.*

(c)...

‘Post office’ “*includes any house, building, room, vehicle or place used for the purposes of the Post Office, and any post office letter box.*”

‘Vehicle’ “*includes a railway vehicle*”. (s.87(1)).
26. Ofcom submits that the broad terms of s.2, in particular the power to “... *collect, receive, forward, convey and deliver in such manner as he thinks expedient all postal packets transmitted within or to or from the British postal area...*” gave the PMG unconstrained powers as to the means by which post was collected from the sender and conveyed/delivered to the addressee; and that the effect of s.87(2)(b) was that delivery of a packet to a Post Office official at the sender’s premises would constitute delivery to a ‘post office’; so that the item would be in the course of transmission by post from that time (s.87(2)(a)). In consequence the collection of parcels etc from the sender’s premises would be within the ambit of conveyance ‘by post’.

27. DHL submits that the PMG's powers under s.2 were not unconstrained. The powers of collection, conveyance etc. were constrained by the words 'postal packet'. As defined this had to be 'transmissible by post'. That meant 'to be transmitted by post', i.e. that at some stage it would go through the postal system. This led to section 87(2)(a), whose effect was that a packet was not transmitted by post, i.e. did not enter the postal system or become a 'postal packet' unless and until it had been delivered to a post office or letter box. Post office includes a vehicle; so this would include collection at the mobile post offices which were to be found in rural areas in 1953. It would not include collection by the Post Office from the sender's premises.
28. As to s.87(2)(b), DHL accepts that this embraced the delivery of a packet by the sender to a postman at his door; but submits that this did not amount to the collection of post, nor therefore its introduction into the postal system : cf. s.2 where the listed powers start with the 'collection' of postal packets. In the context of 1953, the Post Office did not go to customers' premises to collect mail, let alone the type of goods that DHL collects and couriers. Accordingly the 1953 Act did not give the PMG a power to collect packets from wherever it thought fit, e.g. bulk mail from the sender's warehouse.
29. DHL submits that s.3 provided further support for this construction. The section gave the PMG the exclusive privilege to convey 'letters', whether by post '*or otherwise*'; and permitted him to authorise others to do so '*otherwise than by post*' (s.3(1)(a); also (b)). Therefore the meaning of conveyance 'by post' must be restricted; and, consistently with s.87(2), it could not include the collection of packets from the premises of the sender.
30. I prefer Ofcom's arguments in response. As to the meaning of 'transmissible by post' this must mean 'capable of being transmitted by post'. This accords both with the natural meaning of 'transmissible' and the distinction which the definition of 'postal packets' draws between (i) letters, printed packets, parcels etc and (ii) '*...every packet or article transmissible by post*'. Furthermore Ofcom's interpretation fits more naturally with the phrase '*all postal packets transmitted*' in section 2.
31. As to s.87(2), I do not agree that sub-section (b) can be overcome in the way suggested by DHL. True it is that its language is of 'delivery' (by the sender) rather than 'collection' (by the Post Office). However that is equally true of 87(2)(a). In this context delivery and collection are two sides of the same coin. They take place at the same time. In my view the combined effect of s.87(2)(a) and (b) is that, from the moment that the sender delivers the packet, letter etc to the (duly authorised) postman, the item has been collected and is deemed to be in the course of transmission by post (s.87(2)(a)), i.e. as a 'postal packet' within the postal system.
32. Nor do I think it relevant that (if it is so) the Post Office did not collect directly from senders in 1953. The question is whether it had the power to do so. In my view it did.
33. As to s.3, I do not think that DHL's case is assisted by its distinction between conveyance etc. 'by post' and 'otherwise'. The section merely relaxed the PMG's exclusive privilege where the sending/conveyance/delivery/despatch of 'letters' was otherwise than by post (see sub-section (1)(a) and (b); also subsection (2) and its proviso). It did not qualify the PMG's general powers under s.2 or the provisions of s.87(2).

34. I conclude that collection of parcels (as defined) from the sender's premises fell within the PMG's widely-drawn powers; and that the Post Office had an unconstrained power as to the means by which they were then to be conveyed to the addressee.

Post Office Act 1969

35. DHL makes the point that section 2 of the 1953 Act was repealed by the Post Office Act 1969 (s.141, Sch.11). This abolished the office of the Master of the Post Office, replaced the PMG with a Minister of Posts and Telecommunications and established the Post Office as a public authority with powers including the provision of 'postal services' (s.7(1)). The general duty of the Post Office included the provision of "*...such services for the conveyance of letters...as satisfy all reasonable demands for them.*" (s.9(1)). The PMG's exclusive privilege under s.3 of the 1953 Act "*...with respect to the conveyance of letters and the performance of services of receiving, collecting, despatching and delivering letters...*" was transferred to the Post Office (s.23). Section 87(2) of the 1953 Act remained in force and there were minor amendments to definitions in s.87(1).
36. This statute was not examined in argument but I am satisfied that it did not narrow the meaning of conveyance by post. I therefore do not consider that the repeal of section 2 is material.

British Telecommunications Act 1981

37. This statute provided in similar terms for the Post Office's duty to provide 'postal services' (s.59(1)) and for its exclusive privilege in respect of 'letters' (s.66(1)).

Postal Services Act 2000

38. The Postal Services Act 2000 introduced the concept of a 'universal postal service' (UPS) : s.4(1). This implemented the requirement in the Postal Services Directive (97/67/EC). The UPS required at least one collection and delivery of '*relevant postal packets*' every working day (s.4(1)(a)) and at affordable prices in accordance with a uniform tariff throughout the UK (s.4(1)(b)). A 'relevant postal packet' was of weight not exceeding 20 kilograms and dimensions within permitted limits (s.4(7)). In familiar terms, a 'postal packet' was '*a letter, parcel, packet or other article transmissible by post*' (s.125(1); cf. 1953 Act s.87(1)).
39. The Act then replaced the previous monopoly with a licensing system for the conveyance of 'letters'. The restriction provided that : "*...no person shall convey a letter from one place to another unless...*"(s.6(1): cf. the similar language in the 1953 Act s.3(1)). Such conveyance included the performance of the incidental services of receiving, collecting and delivering a letter (s.6(6); *ibid.*). There was an exemption from the requirement to be licensed where the charge for conveyance was not less than £1 or the 'letter' weighed not less than 350 g : ss. 6 and 7.
40. 'Letter' again included a postal packet containing any communication in written form; 'postal packet' included 'parcel'. However the effect of the s.7 exemption for

conveyance for not less than £1 or weight above 350g was to keep all parcels out of the licensing system.

41. The Postal Services Commission was established with the obligation to ensure the provision of the UPS and in respect of licensing (s.3).
42. The Act then introduced the concept of a ‘postal operator’. This was defined as “*a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets.*” (s.125(1)).

“Postal services” were “*...the service of conveying postal packets from one place to another by post, the incidental services of receiving, collecting, sorting and delivering such packets and any other service which relates to any of those services and is provided in conjunction with any of them*” (s.125(1)).
43. In consequence of the removal of the Post Office monopoly and its replacement by the licensing system, a number of the definitions had to be amended. Thus the definition of ‘post office’ substituted ‘*used for the provision of any postal services*’ (s.125(1)) for ‘*used for the purposes of the Post Office*’ (s.87(1) 1953 Act); and the provisions for when a postal packet was in the course of transmission by post substituted delivery ‘*...to a person engaged in the business of a postal operator to be dealt with in the course of that business*’ (s.125(3)(b)) for ‘*...to an officer of the Post Office to be dealt with in the course of his duty*’ (s.87(2)(b) 1953 Act).
44. The provisions of s.125(3) remain in force, unchanged by the 2011 Act.
45. Accordingly the 2000 Act did not narrow the meaning of ‘by post’ or of the ‘course of transmission by post’. In particular (i) a postal operator’s collection of a parcel from the sender’s premises would again commence the course of transmission by post and (ii) there remained no restriction on the means which could be used for its conveyance and delivery.
46. Postal operators operating within and without the licensed area were then given various rights and obligations. Thus e.g. by section 83 they were subject to a criminal offence of intentionally delaying or opening a postal packet in the course of its transmission by post; but subject to any terms and conditions which allowed them to do so: see subsection 3; see also section 84. By section 104 (still in force) a postal packet in the course of transmission by post had the same immunity from examination or seizure or detention as it would if it were the property of the Crown. Both these provisions in turn depend on the s.125(3) definition of ‘in the course of transmission by post’.

White Paper

47. Both parties referred to the White Paper which led to the 2000 Act (Post Office reform: a world-class service for the 21st century: Cmd 4340, July 1999). In my view the meaning of the material parts of the Act is clear without resort to the White Paper. However in view of the debate I should deal with it.

48. The White Paper begins with the statement of the Government's intention to ensure that the United Kingdom "...has a vibrant, competitive postal market and an efficient and effective Post Office to meet the country's needs in the coming years'. The Paper identifies challenges which included customers seeking "international end to end services" (para.2).
49. DHL points in particular to the later passage (Chapter 3, para.18) which states that economic regulation is only necessary in a market where competition is not possible or not fully developed, and continues : "Regulation and red tape should not extend into a market which is operating effectively to the benefit of consumers. The UK postal market outside the statutory monopoly is a vibrant, competitive market with over 4000 competitors. It is therefore the government's intention that regulation should focus on those who are operating within the monopoly area, leaving the rest of the market free to operate as they do now in a largely unregulated environment... In the first instance this means that regulation will focus on the Post Office". DHL submits that this is quite at odds with the contention that the 4000 competitors in a highly competitive market should be subject to regulation.
50. However the statement just referred to was followed by a diagram which identified three broad tiers of regulatory control, namely regulation of services within (i) the 'monopoly area' (ii) within the 'USO (Universal Service Obligation)' and (iii) within the competitive area not subject to the USO. The second tier included 'standard' parcels falling within the USO. The third tier includes 'express' parcels outside the USO.
51. The 2000 Act then reflected those three tiers of regulation in (i) the licensed area (for 'letters' as defined) (ii) the UPS including parcels up to 20 kgs (iii) the provision of postal services outside the UPS.
52. DHL submits that the reference to 'Regulation and red tape' is inconsistent with the view that international end to end couriers were intended to be 'postal operators' or therefore the subject of regulation. Nor can it have been the intention of Parliament to grant 4,000 operators e.g. an immunity from examination, seizure etc of postal packets (s.104).
53. In my judgment, that was indeed the consequence. This appears from the language of the statutes but is in any event confirmed by the White Paper. The many competitors in the third tier were clearly regarded as operating in the 'postal market' and accordingly intended to be 'postal operators' subject to such regulation and privileges as the statute provided.

The 2011 Act

54. The 2011 Act replaced the licensing system with a system of regulation under Part 3. Henceforth any operators could provide postal services, subject only to regulatory conditions imposed by Ofcom : s.28.
55. The Act imposes on Ofcom the duty to secure the provision of a UPS : s.29. This implements the Postal Services Directive as amended in 2008 (2008/6/EC). The UPS has to satisfy 'minimum requirements', e.g. as as to a daily delivery every Monday to Saturday, a daily collection 'from every access point' and the service at affordable

- prices in accordance with a minimum tariff : s.31. Those minimum requirements do not apply to a letter or postal packet weighing in excess of 20 kilograms or outside specified minimum and maximum dimensions laid down by the Universal Postal Union (UPU) : s.33.
56. Ofcom was empowered to designate one or more postal operators as universal service providers (USP) but in only two cases could there be more than one USP: s.35. Royal Mail is the designated USP.
 57. The ‘access point’ for UPS collections “*means any box, receptacle or other facility provided for the purpose of receiving postal packets...for onwards transmission by post.*” : s.29(11).
 58. The conditions which Ofcom can impose on a USP includes a ‘USP access condition’. This includes a condition requiring the provider “*...to give access to its postal network to other postal operators or users of postal services...*” : s.38(2).
 59. The conditions which Ofcom can impose on postal operators include a ‘general access condition’ requiring the operator to “*...give access to other postal operators, or users of postal services, to the operator’s postal infrastructure or any service within the scope of the universal postal service which it provides...*” (s.50(2)(a)). ‘Postal infrastructure’ includes physical infrastructure ‘*such as letter boxes*’ (s.50(3)).
 60. The statutory definition of ‘postal operators’ ‘postal packet’ and postal services’ are unchanged save as to syntax : s.27; cf. 2000 Act, s.125(1). It is common ground between the parties that the 2011 Act made no substantive change to the meaning of ‘by post’ or ‘postal operators’. In short, if DHL’s services as international door to door couriers did not make them postal operators under the 2000 Act, then they were not under the 2011 Act ; and vice versa.
 61. Mr Read points to a distinction between the definition of ‘postal services’ and of ‘postal operator’ in s.27. The definition of postal services includes ‘*...(c) any other service which relates to, and is provided in conjunction with, any service within (a) or (b)*’; but the definition of a ‘postal operator’ refers only to the services in (a) and (b). The 2000 Act had the same distinction (s.125(1)). Set against Ofcom’s regulatory powers under s.28, this demonstrates that Ofcom was empowered to regulate postal services which are wider than those provided by a postal operator. Thus if an undoubted postal operator such as Royal Mail conducts the ‘related’ service of collecting bulk mail from customers, Ofcom can regulate that service - but the service will not be that of a postal operator.
 62. In my view this submission is again defeated by the broad language of conveyance by post (repeated in s.27(1)(a); s.27(3)(a)) and by the specific definition of ‘*in the course of transmission by post*’ in s.125(3) of the 2000 Act. The postal service of collecting parcels from the customer’s/sender’s premises falls within s.27(1)(a) and/or (b), not (c).
 63. Mr Read then pointed to the minimum requirements for the UPS which included the daily collection of letters from every ‘access point’ (ss.31 Requirement 1 para (a); and s.29(11)). This further demonstrated that the collection of items from the customer’s premises fell outside the postal system; and that ‘the post’ did not commence unless

and until the packets etc were delivered to the operator's facility, e.g. post office or the like. He acknowledged that an 'access operator' who brought packets to the UPS access point would be a postal operator.

64. I do not accept this argument. The access point provisions relate only to the UPS. Collection from the customer's premises is not within the UPS requirement; but may still constitute a part of a postal operator's postal services. The fact that the access point is '*for onwards transmission by post*' (s.29(11)) does not mean that postal packets may not enter 'the post' by other means, e.g. by collection from customers' premises. That would be to narrow the scope of the phrase '*in course of transmission by post*' in the 2000 Act, s. 125(3).
65. In these circumstances I again find it unnecessary to look beyond the statutory language of the 2011 Act. However I record that the Act reflected the independent reviews of the UK postal services which were conducted by Mr Richard Hooper in 2008 and 2010 ('the Hooper reviews') : see the Explanatory Notes to the Bill. The 2008 report in its definition of the postal market included both standard parcels (i.e. falling within the UPS) and "*express and courier items which are guaranteed to arrive on a particular day or time, and/or which require a signature on delivery or 'track and trace' facility*": p.25 para.16.
66. As to Hansard, I do not consider that the Pepper v. Hart [1993] AC 593 threshold is met. Once the legislative history has been examined the material provisions are neither ambiguous nor obscure nor do they result in absurdity. If I am wrong on that I consider that the responsible Minister (The Rt. Hon Ed Davey M.P.) was clear in his description of the third tier of regulation. Having dealt with the universal provider (Royal Mail) and with postal operators who provide services within the scope of the universal service, he turned to the third tier of regulation: "*When we debate clauses 46 to 50, we shall discuss the third tier of regulation, which concerns postal operators generally. Such operators could be postal companies that are not operating, particularly, within the scope of the universal service, but are clearly postal operators. For example, they could be express couriers, who specialise in carrying very heavy parcels that are not included in the universal service, or other postal operators, who provide services that fall well outside the scope of the universal service.*" (col.636).
67. Contrary to Mr Read's submission I do not consider that the force of that statement is weakened by the opening reference to future debate on other clauses. There was in fact no further substantive debate on this point.
68. I turn to the five matters which are said by DHL to distinguish it from a postal operator such as the Royal Mail : see paragraph 10 above.

Collection from customer's premises

69. For the reasons considered in detail above, analysis of the legislative history makes clear that it has consistently treated collection from the sender's premises as part of the postal service and that a parcel is treated as in course of transmission in the post from that moment. Royal Mail now has substantial business in bulk mail collection which falls within the postal service. DHL's collection from premises is in no different position.

International carriage of goods

70. DHL points to its aeroplane fleet and other resources by which it conveys goods of all descriptions directly to the consignee. There is no weight limit on what can be conveyed. By contrast, the Royal Mail has no airline and international business and must engage a carrier to ship or fly the mail to another overseas postal operator. That operator then delivers the mail to the addressee.
71. In addition the goods are conveyed by DHL pursuant to the requirements of the international Conventions for international carriage by air, as implemented in the Carriage by Air Act 1961. These Conventions distinguish the carriage of postal items. Thus Article 2.2 of the Montreal Convention (1999) provides that “2. *In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.* 3. *Except as provided in paragraph 2 of this Article, the provisions of this Article shall not apply to the carriage of postal items.*” DHL must also comply with ICAO (International Civil Aviation Organisation) and IATA (International Air Transport Association) codes. By contrast Royal Mail has to follow codes and procedures of the UPU.
72. Citing Garland v. British Rail Engineering Ltd [1983] 2 AC 751 DHL relies on the established principle of statutory construction “...that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.” (per Lord Diplock at p.771B); and submits that it is inconsistent with these international Conventions to treat an international carrier of goods by air as a postal operator.
73. As to customs dues, under its present arrangements DHL is directly liable for these and deals directly with the customs authorities, holding a deferment account for that purpose with bank guarantees running to around £20m per month.
74. By contrast the current regulations (The Postal Packets (Revenue and Customs) Regulations 2011 (2011 No.3036)) provide that, subject to separate provision for foreign postal packets carried by a universal service provider, i.e. Royal Mail (Reg.17), every postal packet containing goods to be exported by post without payment of any duty to which they are subject must be accompanied by a customs declaration stating the nature quantity and value of the goods and have a specified printed label affixed (Reg.18). The receiving overseas postal authority will then collect the customs due from the deliverer. DHL says that HMRC has never suggested that Regulation 18 was applicable to its services; and notwithstanding that the duty is not paid before the goods leave the country.
75. In my judgment none of these features of its international business are inconsistent with the conclusion that DHL is a postal operator. The legislative history demonstrates that there is no constraint as to the means by which packets, parcels etc. may to be conveyed from sender to addressee (or, in the language of carriage, from consignor to consignee). In other words, it would have still been conveyance ‘by post’ if e.g. the PMG/Post Office/Royal Mail had arrangements akin to those of DHL.

76. Nor do the international Conventions for carriage by air provide any distinction or obstacle. Carriage by air is but one possible method and part of the international conveyance of parcels by post from sender/consignor to addressee/consignee. The Conventions were and are not intended to govern the domestic law as to what is conveyance ‘by post’. In any event the established English law pre-dates the earliest Convention.¹
77. Equally I see nothing in the UPU Convention or codes which is relevant to the construction of the domestic statutes. The UPU requires that member states identify a ‘Designated Operator’ for the provision of basic postal services. Royal Mail is the UK’s Designated Operator. That obligation and designation have no relevance to the interpretation of the term ‘postal operator’.
78. My conclusion is that the principle set out in Garland is simply not engaged. In any event the evidence shows that DHL does have some business of non-international couriership of goods, i.e. door to door within the UK.
79. As to customs, I consider that DHL’s arrangements simply reflect its established and commercial practice and have no relevance to the question of its status as a postal operator.

Details of consignor; details of contents; absence of postage labels

80. Again, I consider that none of these features of DHL’s service – individually or cumulatively – provide support for the case that it is not a ‘postal operator’. In my view the underlying fallacy is that a service cannot be ‘postal’ unless it matches the particular practices of the PMG/Post Office/Royal Mail in an earlier age. The legislation contains no relevant restriction. Furthermore the current practice of Royal Mail includes payment on account (without stamping or franking), identification of the sender (by Pre-Printed Impression (PPI)); and contracting on terms which permit the opening of packets or which provide discounts for specified contents.

DHL Express (Austria) GmbH v. Post-Control-Kommission (Case C-2/15)

81. On 21.3.16 Ofcom sent me a copy of the Advocate-General’s Opinion in the above CJEU case. The Opinion was delivered on 16.3.16, i.e. after the close of submissions in this case. It concerns DHL’s courier and express postal services in Austria and the Postal Services Directives of 1997 (97/67/EC) and 2008 (2008/6/EC). As noted above, the 1997 Directive was implemented in the 2000 Act and the 2008 Directive in the 2011 Act. Ofcom submits that the Opinion provides support for its case that DHL is a postal operator. DHL takes objection to this course, in circumstances where Ofcom’s submissions to the Court did not rely on the Directives as an aid to construction; and where the case concerns an Austrian statute. I have concluded that I should not take any account of the Opinion and make my decision without regard to it.
82. My conclusion is therefore that DHL is a postal operator within the meaning of the 2011 Act.

¹ Section 2, 3 and 87(2) of the 1953 Act replace similar provisions in the Post Office Act 1908 (ss.34, 90).

Other person

83. In the alternative Ofcom submits that the IR had also been served on DHL as a ‘person’ within the meaning of Schedule 8 paragraph 1(2)(c). DHL disputes this. A resolution of this issue requires analysis of the correspondence between the parties as well as the IR.
84. On 11.2.15 Ofcom served a “1st draft notice” requesting information under section 55 and Schedule 8, seeking any comments as to content or deadline. The draft made reference to the power to seek information “*from the postal operator (and other persons)*”. An attachment entitled ‘Appendix 1 : Specified postal operators’ included DHL in its list.
85. DHL’s response of 24.2.15 stated that “*we note that you classify... DHL... As a Specified postal operator*” and denied that DHL was a postal operator.
86. On 4.3.15 Ofcom sent a further letter (not on its face in direct response to DHL’s letter) which under the heading of ‘Ofcom’s information gathering powers under the 2011 Act’ stated that ...*we have the power to request information from **any person** who appears to us to have information we require for the purpose of carrying out any of our functions in relation to postal services. In other words you do not necessarily have to be a ‘postal operator’ in order for you to require us to provide information*’ (emphasis in the original). A footnote referred to paragraph 1(1) and 1(2)(c) of Schedule 8. The letter continued : “*That said, we do consider you to be a postal operator...*” for reasons given in the next section of the letter.
87. DHL’s undated response from its Legal Director Nicholas Sandison noted the reference to ‘any person’ and stated that such power only related to ‘postal services’, which DHL did not provide.
88. On 26.3.15 a meeting took place between Ofcom, DHL and other companies (within the Association of International Courier and Express services : AICES) which had been sent the draft requests. The Ofcom attendance note shows that the discussion included the issue of whether DHL was a ‘postal’ operator’ but not the question of a request to some other ‘person’. This is supported by the witness statement of the representative of DHL and of AICES at the meeting. I do not read the evidence of Ofcom’s Mr Rowsell as disputing this.
89. On 1.4.15 Ofcom sent a ‘Second draft’ Notice under section 55 and Schedule 8 and again sought comments. The draft again referred to its power to request information from ‘postal operators (and other persons)’
90. On 8.4.15 Ofcom sent DHL a note on the meaning of ‘postal operator’. The letter also made points on the power to request information from ‘other persons’ under paragraph 1(1) and 1(2)(c).
91. On 21.4.15 DHL replied to the letters of 1.4.15 and 8.4.15 in detailed terms which maintained the argument that the DHL was not a postal operator and submitted in any event that the request was disproportionate and unjustified. There was no reference to the issue of ‘other persons’.

92. On 28.5.15 Ofcom served its formal Notice requesting information. This included the statement that *'We require the information pursuant to Schedule 8 paragraph 1(1) of [the Act]'*, i.e. without distinguishing between the 'persons' identified within paragraph 1(2).
93. In my judgment the Notice of 28.5.15 when properly construed in the light of the preceding drafts and correspondence was primarily directed against DHL as a postal operator but in the alternative was addressed to DHL as an 'other person' within paragraph 1(2)(c). In the course of the correspondence the focus of the debate was on the 'postal operator' issue but Ofcom made it clear that it was alternatively claiming entitlement to serve the Notice on DHL as an 'other person'. I accept that there was no discussion of that alternative at the meeting on 26.3.15 but that is neither surprising (given the wider importance of the postal operator issue to Ofcom and the AICES members) nor inconsistent with Ofcom's maintenance of the alternative basis of request. That alternative was maintained in the letters of 1.4.15 and 8.4.15. The formal Notice of 28.5.15 made the request under 'paragraph 1(1)' which sufficiently embraced a request on either basis.

Flawed IR

94. DHL then submits that the IR is flawed for two independent reasons arising from the terms of Ofcom's statutory obligation under section 55 and Schedule 8. First, that Ofcom has failed to issue a proper policy for information gathering in respect of postal services; and that the IR is therefore a nullity. Secondly, that the IR fails the requirement of proportionality.

Policy/nullity

95. Schedule 8 paragraph 14 provides under the heading of 'Statement of policy on information gathering' that :

*"(1) OFCOM must prepare and publish a statement of their general policy with respect to – (a) the exercise of their powers under paragraph 1 or 3, and (b) the uses to which they are proposing to put information obtained under those paragraphs.
(2) OFCOM may from time to time revise the statement.*

(3) Where OFCOM make or revise a statement under this paragraph, they must publish the statement in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(4) In exercising the powers conferred by this Schedule, OFCOM must have regard to the statement for the time being in force under this paragraph."

96. Paragraph 1(1) of Schedule 8 provides that the entitlement to require information is so as "*...to provide [Ofcom] with all such information as they consider necessary for the purpose of carrying out any of their functions in relation to postal services.*"
97. The 2011 Act came into force on 13.6.11. Its provisions included amendment of section 369(1) of the Communications Act 2003 ('the 2003 Act') so as to add 'the

provision of postal services' as an additional matter for which Ofcom had competition functions. This addition to Ofcom's obligations took effect from 1.10.11. Accordingly, as Ofcom's Competition Policy Director Mr Rowsell states, Ofcom had 3 ½ months to prepare, consult on and finalise all the regulatory instruments required for the new regime.

98. In relation to information gathering it was decided, following public consultation, that as an interim measure Ofcom's existing information gathering statement in respect of its obligations under the 2003 Act should be 'read across' so as to apply to its new powers in respect of postal services under the 2011 Act. The provisions of the 2003 Act for a statement of policy on information gathering (s.145) were in very similar terms to Schedule 8 paragraph 14 of the 2011 Act.
99. This was intended to be an interim position pending review of Ofcom's information gathering policy for all sectors generally. The consultation document including this proposal was published on 8.8.11 and no responses raised objections on this point. This policy was duly adopted and published in Ofcom's statement dated 29.9.11, i.e. two days before it assumed its responsibility for postal services.
100. That statement referred to the duty under paragraph 14; identified the similar duty and statement of policy under s.145 of the 2003 Act; stated the intention to prepare a consolidated statement of information gathering principles in due course and concluded :
- "In the interim, Ofcom's current information gathering statement, and in particular section 3 (which sets out Ofcom's policy) and section 4 (which sets out the uses to which Ofcom will put the information provided) should be read so as to refer to and apply equally (as appropriate) to Ofcom's powers to require the provision of information under section 55 and Schedule 8, paragraphs 1 and 3 of the Act".*
101. It is therefore necessary to turn to Ofcom's statement of policy under the 2003 Act. Much of this relates to provisions of the 2003 Act and the Wireless Telegraphy Act 2006 which, as Ofcom inevitably concedes, have no application to postal services. DHL submits that a policy centred upon information gathering in the distinct regulatory sector of electronic communications cannot reflect a proper statement for the postal sector. Paragraph 14 requires Ofcom to formulate a specific statement of policy for the postal services sector. That obligation cannot be satisfied by a 'cut and paste' adoption of a policy relating to a different communication sector. Thus there is no valid policy to which Ofcom can have the regard which paragraph 14(4) mandates; with the consequence that the IR must be a nullity.
102. In response Ofcom emphasises that the interim policy applies the policy under the 2003 Act 'where appropriate'; submits that where sections of the policy are inapplicable to postal services they accordingly do not form part of the policy for postal services; and identifies sections where there can either be a direct 'read across' or where by simple substitution of the corresponding statutory provision.

103. As to direct 'read across' Ofcom identifies :

(a) Under "General Policy" in section 1:

"Any demand for information under statutory powers will be sent in the form of a notice to the person from whom the information is being requested. The notice will contain details of the information required, the reasons for requesting that information and the purpose that the information is required for. It will also set out the date by which the information must be provided.

Where timescales allow and it is appropriate to do so, Ofcom will send a draft of the information notice to the person holding the relevant information for comment. Following receipt of comments Ofcom will then confirm or amend the information request. Ofcom would not normally agree to any subsequent changes to the final request, including the deadline to the final request."

(b) Under "Ofcom's policy" in section 3:

"Where timescales allow and it is appropriate to do so, Ofcom will send a draft of a statutory information request to the person holding the relevant information and offer three working days for comment, in particular on the relevance of the information sought, other relevant data which may be available and the practicality of providing the information in the given timescale. Following receipt of comments Ofcom will then confirm or amend the information request, generally within two working days. Ofcom would not normally agree to any subsequent changes to the final request, including the deadline to the final request." (paragraph 3.3).

"Ofcom holds a significant amount of in-house information and collects a wide range of data on various aspects of the industry. Wherever possible, Ofcom will draw from existing information sources to avoid unnecessary duplication of effort and to minimise the burden placed on those from whom information is requested. Where appropriate, Ofcom will confirm with the source of the information that the information is still up to date and is relevant in the context in which it is to be used. However, despite this comprehensive evidence base there will remain specific areas where it is necessary to collect additional information. (paragraph 3.6).

Under "Uses to which Ofcom will put the information provided" in section 4:

"Where Ofcom has obtained information for a specified purpose and wishes to use that information for a different purpose, it will first notify the party who provided the information, providing reasons as to why it needs to use the information for the different purpose, and seek their agreement to use it for that different purpose. Where the party who provided the information fails to consent to Ofcom's use of the information for the different purpose, Ofcom will commonly then use its statutory information gathering powers to require that the information be provided for the new purpose." (paragraph 4.4).

104. As to substitution of a corresponding statutory provision Ofcom identifies under section 4 : *"The uses to which Ofcom will put information obtained under [Schedule 8 of the 2011 Act] follows from the purpose for which that information was obtained, which...must be explained in any statutory demand for information under those sections." (paragraph 4.1 (B2/T1/185)).*

105. Ofcom also submits that its exercise of powers under the information gathering provisions and the uses to which they may put the resulting information (see the language of Schedule 8 para.14) is constrained by those very provisions and cannot be widened or narrowed by a statement of policy. The counter-argument must be that this essential truth does not obviate the statutory obligation to formulate a general policy.
106. However in my judgment Ofcom did in fact and law have a general policy within the meaning of Schedule 8 paragraph 14, in the form of the interim ‘read-across’ to its policy under the 2003 Act. Furthermore I consider that this was a reasonable and legitimate interim policy to adopt in the short period which the statute allowed before Ofcom assumed its responsibilities; and think it immaterial that parts of the policy under the 2003 Act were inapplicable or that (in the final example cited by Ofcom) it is necessary to substitute the corresponding statutory provision. As a matter of substance the position would be no different if the material parts of the 2003 Act policy had been extracted and presented in a distinct document.
107. It is also noteworthy that Ofcom did pay regard to its policy for information gathering, notably in its provision of draft Notices to DHL : cf. policy sections 1 and 3 cited above.
108. In any event Ofcom submits that any challenge to the validity of the policy is defeated by the presumption of regularity. This is the principle that public law decisions and acts are presumed to be valid unless and until quashed as being unlawful : Smith v. East Elloe RDC [1956] AC 736; also R (Archway Sheet Metal Works) v. Secretary of State for Communities and Local Government [2015] EWHC 794 (Admin) per Dove J at para.48; and Clockfair Ltd. v. Sandwell MBC [2013] PTSR per Lloyd Jones J (as he then was) at para. 50. There has been no challenge to the validity of the policy within the limit for judicial review claims (or at all); nor is that the relief sought in this claim.
109. DHL submits that the decision in Clockfair demonstrates that the principle of regularity does not apply “*where the illegality is fundamental to a separate, later decision*” (further submissions 8.3.16); and that in this case the validity of the policy is fundamental to the validity of the IR.
110. I accept Ofcom’s response that Clockfair provides no support for DHL’s argument. In that case the validity of the underlying decision (to grant a licence) came into play because the instant application concerned a statutory power to revoke or modify that licence. Hence Lloyd Jones J accepted the submission that “*...the rule against collateral challenge does not extend to preventing a statutory body with express statutory power to revoke or modify that authorisation from examining the pedigree of the authorisation.*” (para.54). He considered the case analogous to a decision (R (Haworth) v. Northumbria Police Authority [2012] EWHC 1225 (Admin)) where the Court held that a statutory power to reconsider a decision could not be defeated on the basis that a challenge could have been made to the original decision (Clockfair at para.57).
111. The present case does not fall within such a category. There is no statutory power to review or reconsider the policy. The challenge is to the IR alone. In consequence my conclusion is that the principle of regularity defeats DHL’s challenge to the policy in any event.

Proportionality

112. By paragraph 1(4) of Schedule 8 *“A demand for information under this paragraph must be proportionate to the use to which the information is to be put in the carrying out of OFCOM’s functions.”* DHL submits that the IR is disproportionate. In order to consider that challenge I must review the detail of the IR and its stated purpose.
113. Ofcom’s purpose in making the IR stems from its obligation to secure the provision of the UPS. By section 29(3) : *“In performing their duty under subsection (1) OFCOM must have regard to – (a) the need for the provision of a universal postal service to be financially sustainable (b) the need for the provision of a universal postal service to be efficient before the end of a reasonable period and for its provision to continue to be efficient at all subsequent times...”*
114. By its IR dated 28.5.15 Ofcom set out the ‘Purposes for which the information is requested’ and referred to its duty under s.29. The Notice then identified two sectors in which it considered that competition from other operators could affect the financial sustainability of the universal postal service.
115. The first was the ‘letters and large letters sector’. The information which it sought (‘Question 1’) was limited to whether or not DHL had delivered such letters in the year to 31.3.15; and if so whether DHL collected information on the volumes delivered. These questions were being asked for the purpose of deciding whether to request further information from DHL about its activities in this sector.
116. The second was the parcels sector. This sector provided an opportunity for Royal Mail but *“...could also pose a threat if Royal Mail fails to achieve its projections. We therefore need better to understand the parcels market currently in order to inform our view of Royal Mail’s likely future within it and how sensitive to market changes future projections may be.”*
117. The two questions in respect of this sector were much more detailed than with the letters sector. ‘Question 2’ was in respect of DHL’s ‘top 20 largest customers’ by volume and asked in respect of each (without the customer being named) information as to the type of goods (by reference to listed categories), volume (in the last financial year) and the associated revenues (net of VAT). ‘Question 3’ asked for revenue and volume information to be provided in accordance with a supplied Excel format.
118. The stated necessity for Question 2 is that the information will help Ofcom understand how the market might be segmented; where the different operators are active; where Royal Mail’s activity ‘sits in this’; how the market is structured (e.g. the degree of concentration of contracts); and what are the dynamics of the sector. The necessity for Question 3 is to enable Ofcom to understand the size of and trends in the sector overall and within different segments’ to understand Royal Mail’s position in the sector (as against others) and to inform its view of the extent of competition in the market.
119. This information was required for Ofcom’s internal (quarterly) reports on the profitability and efficiency of Royal Mail’s universal service network, its quality of service, and the extent of competition. It was also required for its annual statistical survey of developments on the communications sector. For this purpose the

information was also required under Schedule 8 para.3(3) by which Ofcom may require a postal operator to provide it with information relating to postal services, ‘...for use such statistical purposes as they think fit.’ In the same terms as in paragraph 1(4), such a demand must be proportionate to the use to which it is to be put in the carrying out of its functions.

120. DHL’s first challenge on proportionality is founded on its argument that there was no policy; and that in consequence there is no ‘benchmark’ for testing proportionality. In my judgment that point falls away in the light of my findings about the policy.
121. DHL then submits that Ofcom’s assessment of proportionality has taken account only of the use to which the information is to be put and has ignored any consideration of the situation of the recipient of the IR or any other circumstances. DHL points to the Detailed Grounds of Resistance (DGR) where Ofcom relies on the words of paragraphs 1(4) and 3(4) and states that there is no additional requirement to demonstrate proportionality.
122. DHL then relies on six additional matters in support of its argument. First, that the imposition of any form of regulation is an interference with DHL’s fundamental freedom to carry on business. Secondly, that the administrative costs of compliance with the IR are likely to be problematic in such a competitive market as the international door to door courier. Thirdly, that this is not a ‘one-off’ request for information but one that will continue on a quarterly basis. Fourthly, that there is no basis to impose such requirements to provide information in this competitive sector, absent any evidence of market failure. Fifthly, that Ofcom’s concern about the commercial position of Royal Mail in the parcels sector provides no good reason to impose this regulatory burden upon the international door to door courier sector; particularly given the previous statements that regulation and red tape should not extend into a market which is operating effectively for the benefit of consumers. Sixthly, that there has been no satisfactory explanation for serving the IR on some but not all operators in the door to door market.
123. For the reasons essentially given by Ofcom in its response, I consider these objections, individually and collectively, to have no weight.
124. In my judgment the statutory test of proportionality of necessity requires an assessment to be made as to whether the interference or inconvenience caused to the recipient is proportionate to the reasons for gathering the information. There is no reason to doubt Mr Rowsell’s evidence that he had regard to the burden that the request would place on operators and did not consider that it was likely to be particularly heavy.
125. As to interference with the fundamental freedom to carry on a business, this takes the matter no further. The question is whether the IR is a lawful request for information which in turn leads to the issue of proportionality.
126. As to administrative costs, including management time, I accept from Mr Sandison’s evidence that this will not be insignificant but I do not consider it to be disproportionate to Ofcom’s stated need for the information for the purpose of complying with its statutory duty in respect of the financial sustainability of the universal postal service.

127. As to the intention to repeat the request on a quarterly basis, Mr Sandison's evidence is that it would be necessary to set up a dedicated resource for this purpose and that each request would need some management input each time, albeit less than required for the first IR. Again, I do not consider this to be a disproportionate burden.
128. As to the competitive market for international door to door couriers, I consider that this argument misses the purpose of the request. This is to obtain information about the parcels market in order to assess the ability of Royal Mail to develop its parcels business in a way which will support the continuation of the universal postal service. This equally answers the objection taken to regulation and red tape.
129. As to the contention that not all operators have been subjected to the IR, Mr Rowsell's evidence is that the 13 operators to whom the requests were made constituted between 90-99% of total sector revenues; that the balance is distributed amongst a very large number of small operators; and that it would not have been practical or proportionate to identify and then make request of these. I agree.

Conclusion

130. For all these reasons my conclusion is that this claim for judicial review must fail.