



Office of Utility Regulation

Licensing of Postal Operators

Draft Decision

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Office of Utility Regulation
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1. Introduction

The Office of Utility Regulation (OUR) published a consultation in May 2010 on proposals to require competitors in the postal market to obtain a licence from the OUR. Currently the Guernsey postal market is regulated pursuant to and in accordance with the Post Office (Bailiwick of Guernsey) Law 2001 (“Postal Law”). In particular, the Postal Law sets out the postal activities in respect of which a licence is required and those which may lawfully be carried out without a licence.

At present, under the Postal Law and secondary legislation derived from it, the only services which require a licence are those which are Reserved Services, which Guernsey Post has an exclusive right to provide. As a consequence the only postal licence currently in existence is that which Guernsey Post holds¹. All other services may be provided without a licence.

The development of competition in the postal market took a significant step forward in August 2010 when Guernsey Post and the OUR agreed to open up the market to more competition. In the joint statement issued by Guernsey Post and the OUR on the 20th of August, *“Guernsey Post has confirmed that it supports a move towards full liberalisation of the bulk mail market, provided adequate measures are in place to protect the universal service which Guernsey Post is required to maintain. The OUR has welcomed this statement, noting (...) the factors to be considered will include measures such as licensing of competitors, greater pricing flexibility for Guernsey Post in a competitive market and provision for a compensation fund to support the universal service obligation, should that be required.”*

The Director General (DG) at the OUR considers that the licensing of competitors requires a change of the Postal Law. His intention is that such a change should allow him to protect the universal postal service by giving him powers to license providers of postal services other than Guernsey Post. The DG has been consulting on the principle of introducing licensing arrangements for postal service providers outside the Reserved Area and is now consulting on his draft decision.

Following conclusion of this regulatory process, the DG may make a request for a legislative change to the Commerce & Employment Department, which will ultimately be responsible for bringing any proposed modification to the Postal Law before the States of Deliberation. The DG would welcome comments on his draft decision by Friday 31 December.

¹ The OUR granted a licence to Guernsey Post in 2001 on the direction of the States of Guernsey.

2. Structure and Comments

This consultation is structured as follow:

Section 3: considers the legal framework for postal licensing and explains why a change in the Postal Law is needed;

Section 4: summarises the key points made by respondents to the May consultation;

Section 5: explains the DG's Draft Decision; and

Section 6: describes the next steps.

Following the OUR's May consultation on licensing, two responses were received, namely from Guernsey Post Limited (GPL) and Citipost DSA Ltd. In accordance with the OUR's policy on consultation set out in Document OUR 05/28 – "Regulation in Guernsey; Revised Consultation Procedures Information Paper" – all non-confidential responses to the Draft Decision have been published on the OUR's website (www.regutil.gg) and are available for inspection at the OUR's office during normal working hours.

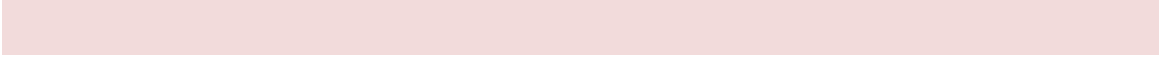
Interested parties are invited to submit comments in writing on the matters set out in this draft decision to the following address:

Office of Utility Regulation
Suites B1& B2
Hirzel Court
St Peter Port
Guernsey
GY1 2NH
Email: info@regutil.gg

The period for comments will run for five weeks. All comments should be clearly marked "Comments on Postal Licensing" and should arrive before 5pm on 31st December 2010.

In line with the policy set out in Document OUR 05/28 – "Regulation in Guernsey; Revised Consultation Procedures", the DG intends to make any further comments received available on the OUR website. Any material that is confidential should be put in a separate Annex and clearly marked so that it can be kept confidential. However the DG

regrets that he is not in a position to respond individually to the responses to this consultation.



3. Legislation

Background

Guernsey's regulatory legislation sets out the overarching objectives of the regulatory regime in all of the regulated sectors (telecommunications, post and electricity) and provides for the States of Guernsey to issue certain directions to the DG in each of these sectors. This legislation and States' Directions set the framework within which the DG regulates the postal sector.

First, the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 sets out the overarching objectives that the DG must promote when exercising his functions and powers in any of the regulated sectors. To the extent that any of those objectives conflict, the DG must balance those conflicting objectives.

Second, the Postal Law sets out the DG's specific duties and functions in the postal sector. The Postal Law defines postal services as:

“the service consisting of conveying postal packets from one place to another, the incidental services of receiving, collecting and delivering such packets and any other service which relates to such services”²

It is an offence to provide any postal services without a licence from the DG³, unless the services fall into one of the exempted categories described in the Law. Currently, all postal services that are not designated as reserved postal services may be provided without holding a licence. The Postal Law also provides that a range of other postal activities do not require licensing, ranging from personal private delivery to delivery of court documents and banking instruments.

The DG may by Order made pursuant to Section 9(1) of the Postal Law designate what services are to be “reserved postal services”. However the DG may only make such an Order:

- If he considers it is necessary to ensure the provision of the universal postal service in the Bailiwick, or
- If it is necessary to comply with States' Directions.

² Section 45 of the Post Office (Bailiwick of Guernsey) Law, 2001

³ Section 1(1) of the Post Office (Bailiwick of Guernsey) Law, 2001

By States' Directions issued in September 2001 pursuant to section 3(1)(b) of the Regulation Law, the DG was directed to issue a licence to Guernsey Post containing an obligation to provide the universal postal service specified by the States and to award to Guernsey Post the exclusive right to provide postal services in the Bailiwick to the extent that such exclusive right was necessary to ensure the maintenance of the universal postal service. In addition, the DG was directed to review and revise the award of exclusive rights from time to time with a view to opening up the Bailiwick postal services market to competition, provided that any such opening up did not prejudice the continued provision of the universal postal service.

These Directions were designed to provide the DG with a framework similar to that in neighbouring jurisdictions, within which he can manage the twin objectives of:

- ensuring the continued provision of a universal postal service throughout the Bailiwick; and
- facilitating the development of a vibrant postal sector in Guernsey to deliver efficient, high quality and good value services to customers and one that contributes to the overall economic wellbeing of the Bailiwick.

The Reserved Area was first set in October 2001 and has been significantly reduced by Order on 14 September 2010, following the agreement reached with Guernsey Post in August 2010.

Change in legal framework

The Postal Law provides that the postal operator – Guernsey Post – which has exclusive rights to provide services in the Reserved Area should have a licence. It is indeed consistent with the principle of the Reserved Area that the company entrusted with a monopoly should be subjected to regulation. Licensing is one form which regulation takes.

By definition of the Reserved Area services, there is no competition in their provision. There can therefore be one provider only holding a licence to provide Reserved Area services. As the Postal Law does not provide for licences other than in the Reserved Area, the DG considers that it is necessary to amend the Postal Law to extend licensing to other postal operators active outside the Reserved Area.

Guernsey Post suggests, in its response, that it would be expedient to extend the reserved area (RA) to the whole postal market and licence more than one competitor to provide

services in the RA. In this way, GPL suggest, a change in the Postal Law could be avoided.

However, the DG considers that the Postal Law needs to be amended by the States because the introduction of licensing for all participants in the postal markets fundamentally changes some of the concepts around which the Law is built. The Postal Law now clearly separates postal activity in the reserved area – regulated, licensed, not open to competition, and used to finance the universal service obligation (USO) imposed on GPL - from activity outside the reserved area, which is open to unregulated competition. The proposal to licence all postal operators would change it in some essential ways:

- Competition will now be regulated, and this through licensing;
- The funding of the USO may not be limited to the mechanism provided by the existence of a Reserved Area; and
- The justification of a Reserved Area therefore changes away from a pure financing role to one of protecting a core USO service for which competition may not be sustainable, or may be sustainable in certain forms only.

4. Responses to the Consultation

This chapter summarises the main issues raised by the respondents to the Consultation. As noted above, two responses were received; from GPL and Citipost. Both parties supported the proposal to licence GPL's competitors.

This section sets out the key comments received and the DG's consideration of them.

Guernsey Post

GPL's response was sent without prejudice to the appeal proceedings which have since been discontinued.

GPL agrees, in circumstances where the reserved area is reduced and further competition is introduced, a licensing regime is appropriate. Such a regime should:

- ensure fair competition
- support the USO if its provision became an unfair burden on GPL
- be comprehensive

GPL also notes that the OUR concept of 'minimum standards' for providers outside of the Reserved Area would be better understood if it had meant 'minimal' and light, not minimum. GPL considers that any definition of a minimum standard should be the core, prerequisite, baseline standards, shared by all licensed postal providers, not simply a low hurdle of obligation for a new entrant, who may yet become the dominant provider.

GPL believes the proposals for a USO fund needs to be better defined by the OUR and understood by new entrants before they apply for licences. Similarly, it maintains there is a great risk of a 'bottomless call' on the taxpayer if the USO cost, the size of the compensation fund and the resulting tax on licensee are not known in advance of licensing proceeding – operators might otherwise withdraw just when they are called upon to contribute to the USO.

GPL supports a compensation fund, which should be paid for in advance, attributed on a 'net value related basis' (without defining further) and possibly delayed for new entrants

but not removed. On consumer safeguards, all licensees should contribute to the cost of an ‘industry-funded resolution of industry failings’ in GPL’s view.

On the possible exemption of certain postal services, GPL agrees to exempting certain categories of mail but not certain operators. GPL does not support a ‘class’ or blanket licence and supports a case-by-case approach believing new entrants should be carefully scrutinised.

GPL does not support the DG’s view that there is a need to change the law to introduce licensing. It believes this is due to a mistaken conflation of the ‘exclusive rights’ and ‘reserved services’ concepts. This arises from a lack of clarity in the States Direction that is the basis of GPL’s existing licence. If the OUR obtained clarification of the direction, the costs of drafting an amendment to the law could be avoided.

Finally, GPL wonders what would happen if it stopped being dominant and whether price controls would then be lifted and whether price controls would be imposed on another operator which became dominant.

Citipost DSA Ltd

Citipost, while supportive of the broad proposals, stated it would not support licensing if the reserved area stays unchanged (a comment made when the Reserved Area was larger than now, with a £1.35 limit for all products) because it sees licensing in such circumstances as nothing other than a mechanism to fund GPL’s USO costs. Also, licensing would add to new entrants’ costs significantly for the areas in which they can compete now. Citipost also believes that a postal licensing regime should encourage reputable and experienced postal operators only, with robust and secure networks. Operators with experience in meeting postal licensing conditions should be given special consideration.

Conclusion from responses

It was noted that both respondents support licensing, even if their perspectives – as an incumbent and as a new entrant – are likely to be very different.

Both respondents support a licensing process which is thorough in its requirements of applicants.

5. Draft Decision

The DG would like to thank both respondents for their comments. He is minded to proceed with the steps necessary to put a licensing regime in place for postal activity in Guernsey. This section provides the DG's consideration of the comments received and sets out his proposed approach to develop a licensing regime for the wider postal market.

Fair competition

An important reason for introducing licensing is that it enables the OUR to regulate postal competition and competitors in a way that is not otherwise possible. In other jurisdictions, a regulator can use competition law to regulate a market but this option is not currently available in Guernsey. Moreover, even where competition law is implemented, it has proved inadequate to regulate competition in network industries (such as utilities and postal markets). Competition law is usually also inadequate to govern the introduction of competition as opposed to regulating it once it is established.

Moreover, as Guernsey Post is required to hold a licence which regulates both Reserved Area and non-Reserved Area services, to the extent that the market for postal services is opened up to competition (even partially), the current licensing regime could result in asymmetric regulation of postal service providers, which has the potential to be unfair to Guernsey Post.

The asymmetry between Guernsey Post and its competitors would be particularly unfortunate in relation to the very useful concept in competition law of dominance. When a competitor is dominant in a market, its behaviour has to be regulated carefully so that it does not distort the working of competition in that market and, in particular, it does not use its market power to charge prices that are too high. Checking the behaviour of dominant organisations is an important duty of competition regulators. A licensing regime, as has been shown with GPL's licence, enables the OUR to discharge this duty. It is important that, if a competitor other than GPL became dominant in one particular market, the OUR could act and implement the usual restraints that should apply in a competitive market. At the moment, the OUR has such a power only in regard to GPL, which is an unsatisfactory state of affairs.

The DG believes there is merit in considering amending this situation.

Protection of the USO

Another important reason for the introduction of a licensing regime is to provide a financing mechanism that allowed the USO to be maintained, should such a mechanism be needed. As noted above, the existence of a reserved area, which GPL alone is allowed to supply, provides GPL with a source of finance and enables it to provide the USO the States mandate⁴. As the reserved area is reduced to extend the range of postal services open to competition, it may be necessary to identify other sources of finance for the USO – provided the USO is provided efficiently and at least cost. This may be required particularly as more and more activities forming part of the USO, for instance the collection and delivery of parcels up to 20kg, including packets, are now open to competition.

A licensing regime is a method that can be used to ensure that all actors in the postal market contribute to the minimum efficient cost of the USO, be it by supplying a USO service, as GPL does, or by paying into a fund to meet GPL's efficient USO provision cost. The DG has concluded that, in view of the limited development of postal competition, such funding is not required now but it is important to have a mechanism in place that needs only to be activated if necessary.

A licence condition to the effect that a licensee may have a financial obligation by virtue of its activity in the Guernsey postal market need not be a barrier to entry and may ensure an orderly development of postal competition.

The development of postal competition depends on appropriate measures being in place to protect the USO, should competition endanger its financing and GPL's ability to provide USO services. Such measures can be in place through an appropriate licensing regime. When GPL and the OUR agreed to open the postal market to competition further, in August 2010, their joint press statement made it clear that licensing would be one of the building blocks of the new competitive regime. The joint statement said:

In this regard, Guernsey Post has confirmed that it supports a move towards full liberalisation of the bulk mail market, provided adequate measures are in place to protect the universal service which Guernsey Post is required to maintain. The OUR has welcomed this statement, noting that any move to full liberalisation in the bulk mail market would be prefaced by a full consultation exercise in which consideration will be

⁴ A forthcoming consultation by the Guernsey Government will launch a review of the USO that should be put on Guernsey Post.

given to all relevant factors. The factors to be considered will include measures such as licensing of competitors, greater pricing flexibility for Guernsey Post in a competitive market and provision for a compensation fund to support the universal service obligation, should that be required.

Who and what should be licensed

The details of the operators and the services that should be licensed will need to be developed once the legislation that enables licensing to proceed is in place. At this stage, it is suggested there should be a presumption in favour of licensing. All activities and operators should be licensed unless there are special reasons for exempting certain activities. An important reason would be the ability to distinguish a licensed from a non-licensed activity in such a way that does not encourage ‘gaming’ by certain market participants (when a service is somewhat distorted in its configuration so as to fall outside the licensed area).

It is worth noting that the Postal Law already exempts certain operators from the obligation to hold a licence to operate in the postal sector and, similarly, exempts certain services.

It is also not desirable at this stage to discuss the conditions that a licence should contain. However, it is important that postal operators to whom a licence is granted should not bring competition in disrepute. The OUR will therefore wish to consult – when it is empowered to set up a licensing regime – on whether there should be financial, operational and ‘fit and proper’ tests of applicants. However the DG is mindful that the licensing regime should not in itself become a barrier to entry.

Licence conditions

As noted above, the form that licences should take will depend on legislation. As a general principle, the DG believes that licences should be as similar to each other and to GPL’s as is proportionate. The DG continues therefore to believe that licence conditions broadly similar to those contained in OUR 10/04 remain appropriate.

6. Next Steps

The OUR is consulting on its draft decision for the next five weeks. The DG would welcome comments on any aspect of the proposals.

Following the completion of the consultation process, the DG intends to ask the Commerce and Employment Department to consider making a request to the States to amend the Postal Law. It is intended that this will occur early in 2011.