

**POSTAL SERVICES (JERSEY) LAW 2004**

**HI-SPEED FREIGHT SERVICES LIMITED**

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**FINAL NOTICE**

**Under Article 24 of the Postal Services (Jersey) Law 2004**

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On 9 October 2008, the Jersey Competition Regulatory Authority (the JCRA) published an Initial Notice under Article 24(1) of the Postal Services (Jersey) Law 2004 (the Law). In that Initial Notice, the JCRA proposed to grant Hi-Speed Freight Services Ltd (the Hi-Speed) a two year interim Class 1 Postal Operator's Licence for the conveyance of Licensed Letters collected from Business customers located in Jersey to Jersey Airport for collection by DHL Global Mail (UK) Ltd (the DHL) for onward conveyance and final delivery to International destinations, subject to the Financial Limitation which is set out in the draft Licence.

The JCRA invited any written representations or objections concerning the proposed exercise of this specified regulatory function and requested that they be made to it by 7 November 2008. The JCRA received only one response to the consultation, from Jersey Post Limited (the JP), in a letter dated 7<sup>th</sup> November 2008. A summary of JP's representations and objections concerning the proposed exercise of this specified regulatory function, and the JCRA's full response thereto, are set forth below. They follow the headings set out in JP's letter of 7<sup>th</sup> November.

**1. Objection to the licensing process being followed by the JCRA:**

(a) Background

JP argues that the intention of the States of Jersey in passing the Law was to reserve certain sectors of the postal market as a means of ensuring that JP could continue to satisfy its Universal Service Obligation (the USO). JP fails, however, to provide any support for this suggested intention. To the contrary, unlike postal laws in other jurisdictions (for example, in the UK and Guernsey), the Law in Jersey does not reserve certain sectors of the market to the incumbent, JP. The Law in Jersey does not create a "reserved area" for the incumbent, but a "licensable area" for the provision of postal services, under which the JCRA may grant an applicant a licence to provide postal services, if doing so is consistent with the JCRA's duties under Article 8 of the Law. Contrary to JP's assertion of the States' intention, the Law's preamble states that the Law is intended to "abolish the exclusive privilege of the States in postal services," and empowers the JCRA to licence JP "and other operators with respect to postal services that concern Jersey."

JP then refers to recent work on the net avoidable cost of the USO which, JP suggests, shows that the net cost of the USO will be £3.8 million in 2010. The JCRA does not accept this estimate and observes that the work being undertaken by JP and by the JCRA on the cost of the USO is not yet completed.

Finally under this heading, JP criticises the JCRA (and the Minister for Economic Development) for not seeking an injunction to prevent Hi-Speed operating the services prior to its receiving a licence under the Law. While Article 5 of the Law provides the JCRA with the discretion to file such an action, doing so would be wholly inappropriate in this case. Hi-Speed has provided the services covered by the proposed Licence since before the entry into force of the Law on 1 July 2006. As such it is properly characterised as a legacy operator and not a new entrant. Hi-Speed duly applied to the JCRA for a Licence, and the JCRA has considered its licence application. The JCRA has fully engaged with JP on the proposed grant of the Licence, prior to the publication of the Initial Notice, and that process of engagement has meant that it has taken longer to reach this stage of publishing a Final Notice than might have been the case if the JCRA had not engaged with JP. In such circumstances, with a legacy operator acting in good faith to comply with the Law, the JCRA concludes that seeking an injunction under Article 5 would not be appropriate. The JCRA notes that under Article 4 of the Law it is open to JP to take action against Hi-Speed if JP has suffered loss or damage as a result of Hi-Speed not yet having a Licence, and that JP has not instituted any proceedings in this regard.

#### **(b) Lack of Regulatory Impact Assessment**

JP argues that market entrants are not required to conduct any form of cost benefit analysis nor does the JCRA carry one out. JP claims that this is contrary to best practice and differs from the JCRA's procedures in the telecommunications sector, where entrants are required to provide a detailed competitive impact statement in support of Class II and III licence applications.

The JCRA has a different view. As stated above, Hi-Speed is not a new entrant, but a legacy operator trying in good faith to bring its existing postal activities into conformance with the Law's licensing requirements. The proper analysis of Hi-Speed's licence application is made in the light of Article 8 of the Law. As stated in Paragraphs 1-18 of the Initial Notice, the JCRA has concluded that the grant of the proposed licence to Hi-Speed would be consistent with these Article 8 considerations.

JP goes on to argue that if another potential entrant were to apply for a licence in similar terms to those set out in the Initial Notice, the JCRA would find it difficult to refuse to grant a licence in similar terms having granted one to Hi-Speed. Were that to happen, argues JP, the proposed limitation on the effect to JP could increase by £150,000 per new entrant. Finally under this heading, JP suggests that multiple operators with such restrictions would find themselves co-ordinating market activity to avoid competing amongst themselves within the sector.

The JCRA disagrees with JP's assertion that it would find it hard to refuse licences to other new entrants. (It should be remembered that Hi-Speed is not a new entrant). The JCRA must consider each licence application on its own merits, based on the circumstances existing at the time. In considering applications for postal licences, the JCRA is bound by Article 8 of the Law. This lays down a primary duty on the JCRA to perform its functions in such a way as to ensure that such postal services are provided as satisfy all current and prospective demands for them. Secondary duties are set out Article 8(2) of the Law. An analysis satisfying the primary and secondary duties in Article 8 would be carried out in respect of any future applications for licences, just as it has been done, as described in the Initial Notice, in the case of Hi-Speed.

JP refers to the JCRA's current consultation on its procedures under Article 11 of the Telecommunications (Jersey) Law 2002, which provides for similar procedures to Article 24 of the Postal Service (Jersey) Law 2004. That consultation, which is not yet completed, does not incorporate a regulatory impact assessment. On the contrary, Paragraph 8 of the *Response to Consultation and Draft Guideline* dated 31<sup>st</sup> October 2008, states that the JCRA's approach to its analysis under the telecommunications law equivalent of Article 8 of the Postal Services (Jersey) Law is that “[t]he level of detail of the JCRA's procedures...will depend upon, and is proportionate to, the function which the JCRA proposes to exercise”.

With regard to potential collusion among postal providers, this would remain subject to the prohibitions contained in the Competition (Jersey) Law 2005.

**(c) Failure to consider JP's cost of providing the USO or the extent of the USO**

JP questions why the JCRA is proposing to issue a licence to Hi-Speed before it has completed its review of the postal market as a whole. It goes on to object that without fully understanding the cost or extent of the USO, JP cannot see how the JCRA can grant a licence which has the potential to impact materially on JP's ability to fund the USO.

In the first place, and given the JCRA's primary duty under Article 8(1) it would be inappropriate to delay the grant of a licence to an applicant which is already providing the services in question, pending the conclusion of any review of the whole postal market which the JCRA may carry out.

Secondly, the JCRA does not agree with JP's estimates of the cost of the USO (nor indeed could it, as this work is not yet completed). For the reasons already stated in Paragraphs 13-17 of the Initial Notice, the JCRA has concluded that the grant of the proposed Licence would not result in JP having insufficient financial and other resources to fulfil its current USO obligations.

**(d) Failure of the JCRA to properly consider its obligations under Article 8(2) of the Law**

JP makes a number of points concerning the JCRA's secondary duties under Article 8(2) of the Law. The JCRA observes generally that while JP attempts to specify duties the JCRA has allegedly failed to consider under Article 8(2), it wholly ignores the Law's primary duty under Article 8(1) of the Law, to ensure that current and prospective demands for postal services in Jersey are satisfied. For the reasons stated in Paragraphs 1-4 of the Initial Notice, the JCRA has concluded that the grant of the proposed Licence to Hi-Speed would be consistent with this primary duty.

- (i) Liberalisation of the postal market in the UK has failed to benefit consumers

JP cites a report from the UK which states that smaller businesses and domestic consumers have not seen any significant benefits from liberalisation of the UK postal market. The JCRA questions the relevance of this statement, for as stated in the Initial Notice, the proposed Licence permits the provision of postal services to business customers only, who can be considered to be users of postal services under Article 8(2)(a).

- (ii) The JCRA has failed to undertake any regulatory impact assessment

JP claims that the JCRA has failed to undertake a regulatory impact assessment. JP fails to suggest, however, the type of assessment it would wish the JCRA to carry-out, or explain how JP's preferred type of assessment is required by the Law. As stated in the Initial Notice, the assessment required for the exercise of a specified regulatory function is set out in Article 8 of the Law. What Article 8 requires is that the JCRA carry out its functions in accordance with its primary and secondary duties. The JCRA has done this as is clear from the Initial Notice.

- (iii) The JCRA has failed to consider the impact of JP trying to compete with DHL's prices

JP states that in theory JP could compete with DHL on the price of mail to international destinations. However in practice competing on a like-for-like basis is impossible, JP alleges, for the reasons mentioned in the four bullet points set out under this heading.

JP's arguments suggest that if JP were to compete with DHL's prices, this would adversely impact on the USO. Essentially, JP argues that it needs protection from competition and the low prices that would result from it.

As previously mentioned, Hi-Speed is currently providing the service, and has been for some time, without any apparent adverse impact on the USO. For the reasons already given in paragraphs 15 to 17 the Initial Notice, the JCRA is satisfied that the grant of the Licence would not materially impact on JP's ability to fund the USO.

## 2. Objections to the proposed licence to Hi-Speed

### (a) Which legal entity should be licensed ó Hi-Speed or DHL ?

JP argues that the JCRA should be licensing DHL and not Hi-Speed. Hi-Speed, however, has applied to the JCRA for a licence, which the Law authorises the JCRA to grant, if doing so would be consistent with the JCRA's duties under Article 8. As has been discussed with JP on several occasions, it is Hi-Speed which collects the mail from business customers in Jersey and conveys them to Jersey Airport for onward transmission by DHL. The JCRA is considering whether, on the facts, and taking into account Article 3 of the Law, DHL (and indeed potentially other entities currently handling mail at Jersey Airport and Jersey Harbour) requires a licence and if so, whether their activities should be the subject of an individual licence or some form of class licence. This further consideration need not, however, cause additional delay to the grant of a licence to Hi-Speed.

JP's observations hint at some suggestion of abuse of a dominant position by Hi-Speed and/or DHL. The JCRA would simply observe that it has power under the Competition (Jersey) Law 2005 to take action against any abuses of dominance.

### (b) Enforcement of Licence Conditions

The JCRA disagrees that there will be difficulties in enforcing the Licence conditions.

Under Condition 4 of the proposed Licence, Hi-Speed will have an obligation to provide the JCRA with information for the purposes of monitoring compliance with the conditions and the Law. Furthermore, the JCRA has information gathering powers under the Law.

The Licence may be revoked if Hi-Speed were to operate outside its terms or in breach of any of its conditions. Criminal sanctions may also apply in such circumstances.

The same remarks apply to the point which JP has raised about monitoring the destination of the mail.

### (c) Application of the USO fund

JP argues that the establishment of a fund must be done *ex ante* (that is, prior to the JCRA establishing that JP's ability to fund the universal service has been adversely affected by the grant of the Licence).

The JCRA would refer to Condition 12.2 of JP's Licence, the material part of which reads:

*“In the event that the provision of the USO can be demonstrated to represent an unfair burden on the Licensee, the JCRA may, with a view to reducing the burden associated with providing the USO, review the extent and frequency of the services comprising the USO and, in addition or as an alternative, may introduce a mechanism for Other Licensed Operators to contribute to the net cost of the USO. The determination of such net cost shall be made by the JCRA following consultation by the JCRA, on the appropriate mechanism to be used”.*

The JCRA would observe that work on the net cost of the USO has not been completed. Furthermore, JP has not applied for a fund and has not demonstrated that the provision of the USO represents an unfair burden on JP.

Having considered this matter in light of JP’s representations and objections, the JCRA now intends to proceed with issuing the licence, as proposed in the Initial Notice, to Hi-Speed. In accordance with Article 24(9)(a) of the Law, the licence shall take effect from 19<sup>th</sup> December 2008.

**17<sup>th</sup> November 2008**

**By Order of the Board of the JCRA**