

## **PROPOSED GRANT OF A CLASS I POSTAL OPERATOR'S LICENCE TO TNT POST UK LIMITED**

To whom it may concern.

I write in order to outline a number of issues relating to this application. These refer to the comparative size of this licence applicant, the size of the local postal services market, the implicit duties of the competition regulatory authority and the potential impact on this particular area of Jersey's economy.

In principle, I support the general concept of competition and, in this instance, strongly believe that the postal fulfilment section of the local postal services business is appropriate for open competition under regulatory licence.

In the detail of the TNT Post UK Ltd (TNT) Initial Notice the Jersey Competition Regulatory Authority (JCRA) has outlined how it has exercised its powers under the Postal Law whilst retaining a level of responsibility for the impact upon the incumbent operator, Jersey Post (JP). In particular, it has devoted detailed consideration to JP's ability to fulfil its Universal Service Obligation (USO) within Jersey.

This is entirely appropriate when undertaking a regulatory intervention in the business of a strategic Island monopoly business where the public of the Island is the majority share holder and the impact on the incumbent monopoly operator is being enforced under law and by regulation.

Indeed, to ease the burden of change on JP, the JCRA has opted to open up the bulk mail market in two phases, to allow JP to implement a cost saving programme which should facilitate the continuing operation of the USO without JP relying on cross-subsidisation from the bulk mail sector.

However, it is my contention that, following the introduction of new licences for businesses to operate within the bulk mail sector, the JCRA is obliged to take on additional responsibility for the fair operation of those licences.

In short, having broken a monopoly control position, whilst assuring a level of transitional "comfort" for the financial position of the previous monopoly incumbent operator, the JCRA also acquires a duty of care and concern for the new licence holders. As it would be inappropriate to put JP out of business by introducing competition, it is – by corollary – appropriate to ensure that the new multi-operator environment within the bulk mail industry is conducted on a "level playing field".

This implies that the JCRA must take a view on the size of the local bulk mail market and how that market will be divided up as the number of operators within it rises. If too many licences are issued, it is inevitable that a lack of market share will be detrimental to a new licence holder.

In a similar vein, if there is a serious disparity between the size of the operations of the new licence holders a potential for imbalance occurs.

In this case, TNT is a hugely powerful company when assessed against the currently approved players in Jersey's bulk mail business, Citipost, HubEurope and JP. TNT

has over 1,000 employees, a reported turnover well in excess of £300M in 2009 and is described as the United Kingdom's market leader in alternative mail solutions and the number one competitor to Royal Mail.

However, those figures – taken from the JCRA initial notice document – relate directly to the licence applicant, TNT Post UK Ltd, a sub-division of TNT Post's world wide business.

On a global basis, TNT operates in more than 200 countries and employs around 160,000 people. In 2009 TNT reported **€10.4 billion** in revenues, an operating income of **€648 million** and cash from operating activities of **€1 billion**. In that **global** context, the introduction of TNT into Jersey's bulk mail industry is the business equivalent of putting a heavyweight boxer in a ring with a few featherweights and, to extend the analogy, potentially without a referee. The likely outcome is that the light weights get knocked out.

Why do I say “without a referee”? This relates to the JCRA's ability to interfere with the internal operations of a business once a licence has been granted, in order to ensure fair play. I am not aware of anything in the Initial Notice document that describes any such capacity being in the remit of the JCRA. For example, should TNT decide to use its significant financial capacity to undercut postal rates within the bulk mail sector, in order to secure dominant market share, how would the JCRA intervene? Indeed, if TNT were to utilise profits from another sphere of its operations to undermine its Jersey competitors, how would the JCRA know if cross subsidisation was even taking place? Furthermore, even assuming that the JCRA had the information systems in place, coupled with intervention powers, would the JCRA be able to act in a timely manner in order to prevent other licence holders going bust during the analysis and intervention process?

In the context of the very small size of the Jersey bulk mail market, I am very concerned that the grant of a licence to TNT holds a worrying potential to dramatically skew the operation of that market in a very unbalanced way. More seriously, such an intervention will occur during a pre-existing transition period that, of itself, is a delicate process.

Whilst I accept that the JCRA has considered the potential impact on JP and the sustainable operation of the local USO, I detect no evidence to suggest that the regulator has considered the newly emergent wider context of its implicit duty of care to new licence holders.

According to the notice document, under Article 8(1)(a) of the Postal Services (Jersey) Law 2004 the JCRA accepts that there is a requirement to consider the effect that a grant of a licence to TNT may have on existing Licensees to satisfy demands for postal services. It is my contention that the JCRA has failed to exercise its responsibilities toward the holders of the licences that have already been awarded, namely Citipost and HubEurope and, by implication, JP. There seems to have been no research conducted on this aspect of the licence award process and no evidence within the notice document capable of refuting my suggestion that TNT could be a damaging and destabilising entrant into the bulk mail sector.

In fact, the documentation indicates that the JCRA has focussed all its attention on the impact of a TNT postal licence on the USO operated by JP and has failed to exercise its remit of care under the law toward the other extant licence holders. In which

context, an award of a licence to TNT may be construed as an ultra vires act by the regulator.

As I hope I have demonstrated, it is one thing for a competition regulator to open up a monopoly market to competition, but it is a wholly different matter if the regulator's actions create an unstable market sector.

This is a further aspect of the regulator's responsibilities that can be seen to lie within Article 8(2)(a) of the law. Here the JCRA has a duty to perform in a manner that is "best calculated to protect and further the short and long term interests of users within Jersey of postal services". In the context of the TNT licence application, this refers to clients within the bulk mail industry.

Bulk mail businesses are already having to accommodate two new entrants into the local market and are now having to contemplate another round of negotiations over mailing contracts with a further set of terms and conditions and pricing structures.

This could be welcome within the environment of a balanced market. Unfortunately, the scenario is entirely different as Jersey moves from a monopoly controlled sector into postal service competition, where the breakdown of the market sector is not clear at all. If TNT further destabilises this small, but significant market sector, it may well not be in the interests of clients in the bulk mailing industry. If matters fail to proceed happily, clients may find themselves having to work with struggling postal service operators or, in the worst case, businesses that are failing to perform as they go under. Once again, there is no evidence to suggest that the regulator has carried out its duty to ensure that the interests of users have been protected, other than to satisfy itself over the sustainability of JP's USO.

This lack of attention to crucial detail is emphasised by the JCRA's claim to have exercised its duty under Article 8(2)(b) by simply noting that "It is widely recognised that the introduction of competition serves to increase productive, dynamic and allocative efficiencies". This is a totally inadequate and opaque response to a requirement "to promote efficiency, economy and effectiveness in commercial activities connected with postal service in Jersey." It is simply saying that competition is a good thing with no supporting evidence. In fact, it is also widely recognised that if the market share of any business area is limited, it is sheer folly to encourage more business operations to further dilute that market place, to the mutual detriment of all parties involved. TNT has been merely analysed as another competitor, apparently ignoring the realities of what TNT is and does.

This paucity of intellectual rigour to be exercised under the regulatory regimen again features under the JCRA's analysis of its own efforts under Article 8(2)(c), which determines whether allocation of a Class 1 Licence to TNT is "best calculated to further Jersey's economic interests". The JCRA simply sticks to its previously espoused view indicated when granting licences to Citipost and HubEurope. This, in brief, outlines some of the efficiencies that competition can introduce with the broad conclusion that if competition is good, then more competition must be better. Once again, this totally ignores the massive stature of TNT and relies on "ring fencing" TNT's activities within the ambit of the licence. Frankly, it is hard to believe that TNT will be content with a modest "slice" of the bulk mail industry "cake".

In conclusion I contend the following:

The JCRA has not recognised the change in its duty remit once a monopoly market position has been opened up to new licence holders. Further, it has failed to understand that it retains a care and concern duty for existing licence holders, which becomes increasingly onerous as additional licences are issued.

The documentation accompanying the TNT Initial Notice contains no evidence as to the size of Jersey's bulk mail market at such a time when all the active licence holders will be operating and no analysis of how the licence holders are likely to impact on each other within that market sector. Other than the operating remit of the licence, there is no indication that the JCRA has, or intends to have in place, any controls to ensure that competition is fair and balanced. For example, how would cross subsidisation be detected and dealt with?

This lack of significant evidence across a wide range of quite serious competition issues does suggest that the regulator has failed to fulfil the requirements of its remit to the extent that it may be acting ultra vires by proceeding with the award of a Class 1 Licence to TNT.

In the light of all the above, I would suggest that a licence should not be awarded to TNT on account of the size of the company in relation to the local market place and the fiscal and operational capacity of the existing licence holders. Accordingly, I lodge with you an objection on that basis, linked – as it is – to the regulatory performance of the JCRA.

In any event, a licence should not be granted until the issues outlined above have been properly researched and understood. I would request, as a minimum, that the grant of any licence should be postponed, pending such analysis.

With best regards

Yours faithfully

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