



JCRA CONSULTATION

Categories of Postal Licences, Licence Fees and Application Procedure

**Consultation Document
2004/4
October 2004**

1. GENERAL INFORMATION

Topics for Comment

Respondents are asked to comment in particular on:

- the licensing structure and regulatory framework;
- the categories of licence;
- the role of significant market power (SMP) in the licensing regime; and
- the application fees and licence fees.

Consultation Procedure and Timetable

Following consideration of responses received to this Consultation Paper, the final licensing structure and regulatory framework and the application fees and licence fees will be published.

The consultation period will run from 5 October to 22 October 2004. Written comments should be submitted to:

Mr Paul Hamilton
Postal Case Officer
Jersey Competition Regulatory Authority
6th Floor Union House
Union Street
St Helier
JE2 3RF
Jersey

E-mail: enquiries@jcrj.je

All comments should be clearly marked “Comments on Consultation Document 2004/4”, and marked for the attention of Mr P. Hamilton.

2. INTRODUCTION

This document outlines the procedures which the JCRA intends to put in place for the submission of applications for postal licences. The proposed procedures are designed to be easy to use, clear and light-handed while at the same time ensuring that the JCRA has adequate and appropriate information on which to base its decisions. The information requested is the minimum necessary for the JCRA to make informed decisions on applications. There is provision for requests for further information where necessary.

There are two proposed types of licence:

- Class I - General Postal Operators Licence is for those applicants without Significant Market Power (SMP)
- Class II - Postal Operators Licence for those with Significant Market Power

All applicants must complete the official application form but must supply different levels of detail depending on the class of licence being applied for. The application form makes clear the sections that are relevant for each class, with the primary 'Class II only' requirement being the completion of a Competitive Impact Statement ("CIS").

The staff of the JCRA are available, where appropriate, to offer guidance on the submission of licence applications, and to answer any queries that applicants may have on the nature and extent of the information required.

2. DISCLAIMER

The information contained in the 'Application Information' section is for the purpose of guidance of applicants only. It is not intended to and should not be construed as placing any limit whatsoever upon the exercise by the JCRA of any of its powers and duties under the provisions of the Law.

3. SCOPE AND TYPES OF LICENCE

3.1 Legal Framework for Postal Services Licensing in Jersey

The Postal Services (Jersey) Law 2004 ('the Law') provides for the licensing of any postal services. 'Postal Service' means the conveyance of postal packets, the incidental services of receiving, collecting, sorting and delivering postal packets, and any other service that relates to any of those services and is provided in conjunction with any of them.

The introduction of the Law will not require every postal service to be licensed. Article 7 of the Law provides for a number of exceptions to the requirement for a licence, in particular for the conveyance of letters that each weigh more than 500 grams or if consideration is the payment of more than £1.30 (per letter). This is the legal framework behind the concept of the Reserved Area, outside of which open competition is promoted

without the need for a licence. Under the Reserved (licensed) area the JCRA will determine which companies are licensed to compete with Jersey Post, with a reduction in the size and scope of this area, as time progresses, being envisaged.

The ultimate decision regarding the awarding of licences will be made on a case-by-case basis.

The procedures that the JCRA will follow in respect of issuing and consulting on licensing decisions are set out in Parts 4 and 5 of the Law: 'Licences' and 'Notice, Consultation and Appeals'.

3.2 Licensing Structure and Regulatory Framework

The Law provides for the Authority to grant a licence authorising a person to convey letters. Article 16 of the Law provides for the award of class licences which allows the Authority to designate certain postal operators as 'public' whereupon, in particular, postal equipment such as letter boxes may be installed near roads.

The JCRA's licensing structure is based upon two classes of postal services licence:

- (i) **Postal Service Operator Licence - Class I**
For entities providing postal services to the public, who *do not* possess SMP;
- (ii) **Postal Service Operator Licence – Class II**
For entities providing postal services to the public who *do* possess SMP.

The licences will form modular building blocks. Hence a Class II licence will include all of the conditions in a Class I licence, plus conditions specific to Class II.

The information required from applicants will relate to the class of licence requested. Applicants for Class I licences will be required to provide minimum information only; applicants for Class II licences will be required to provide more detailed information, including a CIS. Licence terms and conditions will relate to the operations of the licensee.

Class II applicants are advised that their CIS ought to be completed at the earliest possible stage in the application process. No application form will be accepted unless it is accompanied by, or the JCRA has already received, a satisfactory CIS and the appropriate application fee has been paid. For more information on the CIS, please contact the JCRA.

The JCRA encourages all potential applicants to give the JCRA an indication of their intentions at the earliest possible stage of the application. In most cases this is likely to be during the pre-screening stage in the preparation of a CIS. The JCRA hopes that by establishing a dialogue with an applicant early on, the efficiency of the process will be enhanced. It ought to ensure that the application is properly targeted from the outset, and that it remains so during its preparation. This should benefit all concerned by reducing the likelihood of delays caused by requests for further information at the later stages. There is a provision for requests for further information where necessary. The failure to provide sufficient information at the outset is likely to delay the JCRA's decision on the award of a licence.

Any applicant who is in doubt as to which class of licence they ought to apply for, or indeed whether a licence is needed at all, should contact the JCRA for guidance. The JCRA encourages all providers of postal services to register with the JCRA, no matter how small their business.

Q.1 Do consultees agree that the proposed two classes of Licence will meet the requirements of the Postal Services Law?

3.3 Significant Market Power (SMP)

The JCRA believes that a finding of SMP may not be incompatible with some competition in the market. In an *ex-ante* environment, market power is essentially measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues. Often the lack of evidence or of records of past behaviour or conduct will mean that the market will have to be based on a prospective assessment.

The market power of an undertaking can be constrained by the existence of potential competitors. The JCRA wishes to use a clear and demonstrable benchmark for the assessment of market power. Criteria for assessing SMP could be based on market shares. A market share test is set as providing such a benchmark. For example, in the UK, where the shares are greater than 25%, this will often be used as a proxy for market power.

In addition, if an undertaking's market share has remained stable over time, there could be a presumption of SMP. On the other hand, if market shares fluctuate over time, this may be indicative of a lack of market power in the relevant market. Finally a loss of market share may indicate that the market is becoming more competitive. 'Barriers to entry' can also be used as a means to measure market power.

Any new operator in Jersey will be unlikely to have SMP and consequently may be expected to apply for a Class I licence. Thereafter, movement by a licensee into Class II will depend on that licensee meeting the criteria for designation of SMP.

Upon designation of a licensee as having SMP, and therefore becoming a Class II operator, the relevant Class II licence conditions will be triggered and will bind the licensee in question.

Q.2 Do consultees agree with the concept of Significant Market Power and how that concept will be used in relation to the Law?

3.4 Separate Applications from Legal Entities

Licences will be granted only to the person or company named in the licence application. Licences are required by all separate legal entities. This means, for example, that a licence issued to an individual may not be used for the benefit of any company of which the individual is a director. Such, a company must have its own separate licence.

4. LICENCE FEES

a. Introduction

As part of the new Postal licensing regime, which will be introduced when the Postal Services (Jersey) Law 2004 comes into force, postal operators will be charged licence fees by the JCRA.

This part of the consultation paper aims to present the views of the Authority on the most appropriate way to formally address the issue relating to the charging of licence fees.

b. Legal Basis for the Charging of Fees

Article 18 of the Law allows for the JCRA to recover licence fees.

The key provisions are Article 18(1) which establishes the principle that the fees may be charged whilst Article 18(2) enables the Authority to recover its costs.

c. Proposed Fee Structure

The proposed fee has been devised in accordance with the JCRA's licensing structure, which is comprised of two types of licence; a Class I licence to cover postal operations which have no discernable impact on the competitive market and a Class II licence for entities providing postal services to the public who do have SMP.

The proposed fee structure is to have a one-off application fee, and a periodic licence fee. This follows the same basis upon which the JCRA charges licensees in the telecommunications sector. The level at which these fees are set would differ according to licence type; Class I fees would be set at the lowest level and Class II fees at the highest.

Given the intention that the JCRA should be financially self-sufficient, with licence fees as its source of income, the costs of the JCRA have to be used as the benchmark for the projected total of the licence fees paid by postal operators. Since Class I applicants are likely to generate minimal regulatory work, it is proposed that the Class I licence fee is set at a flat rate. For Class II applicants, the JCRA is of the view that a licence fee calculated on the basis of turnover would be most appropriate and equitable means by which to spread the costs of regulation between the different players in the market.

It is important to note that as the JCRA currently receives licence fee income from telecommunications operators, the proposed cost basis for levying postal licence fees is on a proportionate basis to the costs directly allocated to postal regulatory work.

A turnover-based licence fee will only work if there are clear guidelines on how to calculate turnover, which must apply equally to all players. The turnover on which the fee will be levied will be regulated turnover that is *referable to Jersey*.

The JCRA proposes that licence fee payments are made quarterly in advance. This is a system which currently works effectively in the telecommunications licensing regime.

Q3. Respondee are invited to comment on the proposed licence fee structure as

outlined above.

d. Application Fees

Under Article 18 of the Law fees may be related to the administrative costs of licensing. This will be achieved by a one off **application fee** payable with all applications, and a periodic **licence fee**, to which all successful applicants will be subject under the conditions of their Licence. No Licensee will be able to exercise the rights of their licence until the appropriate fees have been paid.

The completed application form must be accompanied by the appropriate application fee, payable to the Jersey Competition Regulatory Authority. No application will be considered until the application fee has been paid.

The proposed application fees to cover administration and the placing of Notices in the Jersey Gazette as required by the Law are as follows:

- Class I Licence - £500
- Class II Licence - £100,000

The basis upon which the Authority proposes the application fee for a Class II licence is due to the amount of work needed to be undertaken by the Authority in the exercise of its functions to licence the monopoly incumbent postal operator with a licence. These funds will be required by the JCRA in advance to cover costs incurred in considering the application and devising the appropriate licence and in order to help with cash flow ahead of receipt of licence fee income.

Q.4 Consultees are asked to comment on the concept of the Application Fee being relevant to work carried out in licensing an operator.

e. Reconciliation of Costs and Fees

In the event that the amount collected by way of Licence fees in a particular year (calculated on the basis of the final year end accounts of the JCRA) exceeds the amount required by the JCRA to meet the purposes described in the Law, it is intended that such a surplus not be retained by the JCRA, and that a mechanism be in place for balancing any excess fee collected. Similarly, if in any year there is a shortfall in the licence fee collected due to unanticipated costs, the JCRA will consider making up such a shortfall imposing an additional fee or levy on the licensees within the calendar year in which the shortfall arises, or by obtaining short term funding and increasing the licence fee or levy in the following calendar year.

Q.5 Do consultees agree with this approach?

f. Enforcement and Recovery of Fees

The requirement to pay the licence fee will be included in the licence conditions and therefore a failure to pay a fee will constitute a breach of licence. However, under the Law, fees “*shall be recoverable as a civil debt to the authority*”. The JCRA is of the view that it may be judicious to include an additional licence condition that a bank guarantee is

in place for the payment of licence fees. In this respect consultees are reminded that if the JCRA were to suffer a shortfall in revenue, owing to one licensee's failure to pay their licence fee, ultimately the shortfall would have to be made up by the remaining licensees.

In order to encourage the prompt payment of fees, the JCRA also proposes that if a licensee fails to pay any amount due to the JCRA by the due date, the unpaid amount will accrue interest daily from the due date to the date of payment at four percentage points above the published base rate of the Bank of England.

Q.6 Comments are invited on the proposal to recover fees.

5. APPLICATION PROCEDURE

All applicants must complete an official application form.

5.1 Review of Application

The JCRA will review applications received with a view to establishing that:

- the application, including the CIS and the declaration, is in due form and has been properly and fully completed;
- the service falls within the licence type applied for;
- the applicant is not disqualified from holding the licence concerned; and
- the appropriate application fee has been paid.

If the JCRA considers that the application has not been properly completed, or that the information provided by the applicant is insufficient to support the application, the JCRA shall contact the applicant within 56 days of the original application in order to seek further information or to request that the application be resubmitted. Please note that in such cases, the award of any licence to the applicant may be delayed.

5.2 Evaluation of Application

In evaluating an application for a licence the JCRA will be concerned to ensure that there are no grounds to doubt, *inter alia*, that:

- the proposed service is lawful and consistent with international obligations and with Jersey Law;
- the Applicant has the necessary financial, managerial and technical resources to operate the proposed service;
- the proposed service will meet the requirements specified in the application form and CIS, and the applicant will comply with the conditions of the Licence and with any additional conditions which the JCRA may consider appropriate having regard to relevant legislation; and
- service, quality and affordability will be assured.

5.3 Decision on Grant of Licence

The JCRA will endeavour to deal with all applications as speedily as possible. In any event, the JCRA will notify the Applicant of its decision in relation to the grant of a licence within 56 days of receipt of the licence application provided that the application is in due form and has been properly and fully completed.

If additional information is required after the original application has been submitted, it may be necessary to extend the 56-day period. A decision on the grant of a licence will then be issued, in accordance with the Law, within 56 days of such time at which the JCRA considers the application to be in due form, properly and fully completed, with sufficient information having been received. If sufficient information is not provided, it is likely to result in the refusal – automatic or otherwise – of the application.

The JCRA will issue to the applicant an initial notification of its decision in respect of the licence application and will simultaneously issue a public initial notice stating its decision, and the date at which the decision is proposed to take effect, in accordance with its duty under Article 24 of the Law.

Under Article 24, the period between the issue of the initial public notice of the JCRA's decision and the date on which that decision is proposed to come into force shall not be less than 29 days. Any person may make representations or objections to the Authority about the decision within the intervening 28-day period.

If any representations are made within the 28 day period, the JCRA will consider them and then issue a public final notice stating its decision on whether or not it intends to proceed to grant a licence in the light of any representations or objections that have been made. It will simultaneously issue the Applicant with a final notification of its decision.

5.4 Exercise of Rights

Provided the relevant application fee has been paid, an applicant will be entitled to exercise the rights conferred by the relevant licence upon receipt of the final notification of the JCRA's decision to grant the licence.

Q7. Consultees are invited to express any comments they have on the application procedure proposed by the JCRA.