

TRANSPOSITION OF THE EU POSTAL DIRECTIVE INTO UK LEGISLATION.

On the 5th July 2002, a new EU Postal Services Directive (2002/39/EC), which amends the previous Directive (97/67/EC), came into force. Member States are required to implement this by 1st January 2003. The Secretary of State for Trade and Industry has asked Postcomm to advise on the best means of giving effect to the new Directive in the UK. Accordingly Postcomm have published a consultation document, with responses to Postcomm required by the 31st October. On the basis of this consultation Postcomm will formulate its advice to the Secretary of State.

The elements of the new Directive which need to be incorporated into the UK legislation are:

- (a) The reductions in the weight and price thresholds of the reserved area. (Article 7).
- (b) Removal of discriminatory provisions in the Consignia Licence (Article 12).
- (c) References to special tariffs (Article 12), and
- (d) User complaints (Article 19).

Of these, the most important is the first and this working document contains Consignia's position on this. There are two fundamental approaches to the liberalisation of the postal market. The first, a reduction in the reserved area which offers monopoly protection in order to support the provision of the universal service at a uniform and affordable tariff. The second is to manage the market opening through the controlled issuing of licences. The EU has chosen the former approach. Postcomm have selected the latter. Their consultation document brings out clearly the conflicts which arise when attempting to liberalise by these two approaches simultaneously.

Postcomm, in their consultation document, describe four alternative approaches to implementing the Directive's proposals for the reduced reserved area;

- reducing the UK licensed area in line with the EU reductions in the reserved area,
- reducing the licensed area to 100 grams in January and then leave it at that level indefinitely,
- maintaining the licensed area at 350 grams and finally,
- maintaining the licensed area at 350 grams whilst reviewing the development of the market and modifying subsequently if necessary.

Postcomm have made it clear that they favour maintaining the licensed area at 350 grams. Consignia does not believe that this is a sustainable position, is not consistent with the spirit of liberalisation required by the Directive and will perpetuate a system of regulation for the sake of regulation. Postcomm will be advising the Secretary of State for Trade and Industry who has a stated policy of reducing the burden of red

tape and regulation on industry. It is difficult to reconcile that overarching policy objective with Postcomm's declared preference for maintaining an unnecessary licensing regime for the postal industry.

Each of the options for implementing the reduced reserved area is discussed in detail below:

Option (a) Reduce the UK licensed area to 100 grams in 2003 and to 50 grams in 2006.

This method, which would require an amendment to Section 7 (1) of the Postal Services Act, is closer to the spirit of liberalisation and would enable regulation to wither away gradually as competition is introduced. This is consistent with EU postal Directives, which provide for a gradual and controlled introduction of competition through a phased reduction in the weight and price limits and a free market operating outside the reserved area. Consignia has consistently supported this approach.

In the consultation document Postcomm suggest a number of drawbacks of this approach. Specifically;

- (a) *“A smaller licensing base would restrict Postcomm's ability to check the credentials of new postal operators . . .”*

The EU, in Directive 97/67/EC, allows authorisation procedures, including individual licences, for non-reserved services within the scope of the universal service to ensure compliance with essential requirements and to safeguard the universal service. Essential requirements are defined as non-economic reasons which might require conditions on the supply of postal services. A specific list is given: confidentiality of correspondence, security of the network as regards the transport of dangerous goods, data protection, environmental protection and regional planning. In the consultation document Postcomm says (para 3.28) that *“although the UK licensing regime above 100 grams (and in 2006 above 50 grams) would be limited to “essential requirements” it would enable Postcomm to impose universal service obligations and protect postal users in respect of issues such as delivery obligations, mail security and arrangements in the event of cessation of business”*. The list provided by the Directive describing essential requirements does not include the protection of postal users generally, whose protection is to be guaranteed by the choices made available through a competitive market. Neither are mail security arrangements or arrangements in the event of cessation of business essential requirements in the sense defined in the postal Directive. It is only in the relation to the provision of the universal service as a whole that cessation of business is an issue and that concern applies in relation to the whole of the universal service area, not just those services for the conveyance of items weighing less than 350 grams which is the licensing limit which Postcomm prefers to keep. It may indeed be the case that a smaller licensing base would restrict Postcomm's ability to check the credentials of new postal operators but that is a consequence of liberalisation in accordance with EU policy for the postal sector with which the UK, and Postcomm, must comply.

- (b) “. . . and would progressively reduce the size of the licensing base for any future measures to support the universal service including a compensation fund.”

The European Commission, following intensive studies of the postal sector, is satisfied that its decisions on opening up the postal market offer adequate protection for the universal service. There may be additional risk to the universal service in the UK due to Postcomm’s own proposals to go beyond the EU approach and issue licences within the EU reserved area. It is apparent that an approach which involves the rapid introduction of competition within a significantly smaller reserved area could undermine the universal service.

Contrary to the implication in 3.17 of the consultation paper, there is no provision in the legislation for the establishment of a compensation fund to support the universal service. In fact, section 102 of the Postal Services Act provides that if the Secretary of State considers that it is likely the USO will not be fulfilled he may inter alia make an order providing for financial support. It will be apparent that this power is not related to the scope of the licensing regime. Consignia has previously argued, in responses to earlier consultation documents on market liberalisation, that universal service compensation funds are not practical or economically efficient in the postal sector and there is no example of a working compensation fund in postal markets overseas. At the risk of stating the obvious, it is incumbent on Postcomm to ensure that the pricing regime it imposes on licensees is adequate to enable them to finance activities required by their licences (PSA Section 5[4]).

- (c) “As Postcomm would have an ever decreasing segment of the market to regulate, Postcomm might need to exercise tighter controls on those operators that it did license in order to ensure the delivery of the universal service”.

Since the only controls that Postcomm can apply to operators above the new weight and price limits are for essential requirements any tightening of controls, with the purpose of ensuring the delivery of the universal service, would only be applicable to operations below these limits. Extending the licensing regime would have no effect on Postcomm’s powers in this respect. Postcomm’s only power is to limit the number of licences, or the scale of operations that those licence holders can undertake, below the EU defined weight and price thresholds. The EU clearly takes the view that the reduced reserved area will be sufficient to support the universal service (to the extent that the opening up of the market to competition does not). The difficulty to which Postcomm refers is a consequence of its own policy of granting multiple licences within a shrinking reserved area.

- (d) This option could also impact on Postwatch’s ability to fulfil its statutory obligations.

As Postcomm says, in para 3.19, Postwatch’s remit is based on relevant postal services, which are services required to be licensed and the universal service. Since licensed services fall within the universal service then a reduction in the licensing threshold will have no impact on Postwatch’s overall remit. This is the inevitable effect of liberalisation and reflects the EU’s belief in the ability of a liberalised market to meet customer’s needs.

Option (b) Reduce the UK licensed area to 100 grams in 2003 and retain it at that level in 2006 and beyond.

As Postcomm says this is a variant of option (a) with very similar implications. All of the above comments also apply to this option.

Option (c) Maintain the UK licensed area at 350 gms.

The UK, and Postcomm, must give effect to the Postal Directive. Failure to adopt a different licensing policy in relation to services outside the reserved area would restrict competition in a manner which is inconsistent with the Directive. To meet the terms of the Directive it will be necessary for Postcomm to transparently show that it is not restricting competition in the weight and price ranges that are newly opened to competition. This would require a different licensing policy in the two ranges – below 100 grams (50 grams after 2006) and between 100 grams and 350 grams. The licensing policy in the higher weight zones will be purely to ensure “essential requirements” whereas the licensing policy in the reserved area would be such as to restrict competition where necessary in order to protect the viability of the universal service. If the licensed area were to remain at 350gm it would be incumbent on Postcomm to effectively ‘police’ the market to ensure that infringement of the licensed area was taking place not only below 100 grams but also between 100 grams and 350 grams. It would also need to demonstrate that its reasons for controlling operations in this area were purely for “essential requirements” whereas it does not see the need to protect essential requirements for items in between 350 grams and 2 Kilograms (the universal service weight limit for postal packets). This is discriminatory and unnecessary. It is also counter to government policy of reducing the burden of regulation for industry.

Maintaining the licensed area at below 350 grams would not avoid the need to change the Postal Services Act because, as Postcomm themselves say, a simple administrative change by Postcomm would not provide the requisite legal clarity.

Postcomm argues that licensing in this range would enable them to protect postal users in respect of issues such as delivery obligations, mail security and arrangements in the event of cessation of business. In addition to the point made above that Postcomm do not have such powers outside the reserved area it is also the case that customers will be able to negotiate such arrangements as part of their operational contracts with the operators, if they require them.

Option (d) Maintain the UK licensed area at 350 gms and review the limit in the light of market developments.

Since licensing above 100 gms would be for essential requirements only, monitoring the market with a view to reviewing the limits of the licensing area would be of no value, since as explained above licensing outside the reserved area can have no impact on the market.

Other elements to be transposed.

The other elements of the new Directive which need to be implemented in the UK and on which Postcomm are seeking views are:

Article 12: Removal of discriminatory provisions in Condition 9.

The only way to remove the discrimination in Condition 9, Part 1, para 2 is to remove the word “large” from the reference to users. If this results in substantial numbers of small users seeking to negotiate access terms, Consignia and Postcomm would need to consider a response to the new situation.

Article 12: Special tariffs and access prices

The EU Directive gives a clear statement as to how special tariffs should be determined by universal service providers. It refers explicitly to “The tariffs shall take account of the avoided costs as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items”. The PSA 2000 and the Consignia licence are less prescriptive. There should be a clear statement in the UK legislation and Consignia Licence interpreting the Directive’s text on special tariffs.

Article 19: User Complaints

The replacement paragraphs to Article 19 throw into focus the need for operators who use Consignia’s networks to assist in the conveyance of correspondence, to have in place procedures for complaint handling. Furthermore Consignia believes that it would be appropriate for the extension of such requirement to be placed on operators who offer services which are “within the scope of the universal services defined in Article 3, but which are not provide by the universal service provider” as permitted by Article 19.

**Consignia plc,
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