

**GRANT OF LICENCE TO HAYS COMMERCIAL  
SERVICES LTD**

**DECISION DOCUMENT**

**SEPTEMBER 2001**

## Summary

On 16 July 2001, the Postal Services Commission ("Postcomm") issued a consultation notice on the proposal to grant a short term licence to Hays Commercial Services Limited trading as Hays DX ("Hays"). Representations on the granting of that licence were requested by 15 August 2001. The representations have been considered by Postcomm which has decided to grant a licence to Hays, in terms modified from the draft consultation licence.

This document summarises main points of the responses to the consultation, sets out the reasons for the decision to grant a licence to Hays and explains the changes made to the draft consultation licence.

## Table of contents

### 1. Introduction

Purpose of this document  
Background  
Contact details at Postcomm

### 2. Consultees' representations on the proposed licence grant

Requests for further information  
Universal service obligation  
Approach to licensing  
Duration of the licence  
Terms and conditions of the licence  
Performance standards  
Press notice  
Freedom to compete

### 3. Postcomm's views on the representations

Requests for further information  
Universal service obligation  
Approach to licensing  
Duration of the licence  
Terms and conditions of the licence

Performance standards  
Press notice  
Freedom to compete

#### 4. Postcomm's decision

Background  
Assessment of impact on universal service  
Competition  
Ability to finance licensed activities  
Decision

#### 5. Key changes made to the consultation draft

Summary of key changes  
General tightening of the service restriction  
Mailline service definition  
Availability of Mailline service  
Overall assessment of safeguards

#### Appendix 1

List of those who responded to the consultation notice on the proposal to grant a licence to Hays.

# 1. Introduction

## **Purpose of this document**

- 1.1 This document explains the outcome of the consultation process recently undertaken on the licence application received from Hays Commercial Services Limited, trading as Hays DX ("Hays") and outlines the background to the decision taken to grant a licence to Hays.

## **Background**

- 1.2 On 26 March 2001 the new regulatory regime for postal services established by the Postal Services Act 2000 came into force. On 15 April 2001, an application was received from Hays for a licence under Section 11 of the Postal Services Act 2000 ("the Act") under the terms of Postcomm's Interim Approach to Licensing published in April 2001.
- 1.3 On 16 July 2001 Postcomm issued a consultation notice on the proposal to grant a short term licence to Hays under Section 11 of the Act. This sought views on Postcomm's proposal to grant a licence to Hays and the form of that licence. Under the terms of the statutory notice, representations regarding the draft licence were requested by 15 August 2001.
- 1.4 The proposed licence covered three proposed postal services:
- Collection, streaming and consolidation of mail from customers of Hays' document exchange service
  - A pre-8am target delivery service for customers of the document exchange service sending letters to business premises in the London EC and WC, Edinburgh EH1 and EH2 and Manchester M1 – M5 and M60 postcode districts, and
  - additional services for customers of the Hays's Mailline service in the insurance, travel, tourism, opticians', licensed betting and retail financial services industries.
- 1.5 Postcomm received formal responses or enquiries from six respondents. None of the responses were marked "confidential". A list of those who responded or enquired is attached at Appendix 1. Copies of the responses are held in Postcomm's library.
- 1.6 The responses to the consultation focused on a number of key areas, including:
- The impact, if any, of the grant of the licence on the universal service;
  - Consistency with Postcomm's interim approach to licensing;
  - The duration of the proposed licence; and
  - The terms of the proposed licence.

- 1.7 We gave very careful consideration to the representations received and made a number of amendments to the consultation draft of the licence in response to them. Postcomm is satisfied that the granting of this licence, with the safeguards it contains is a proper exercise of its functions under the Act.
- 1.8 This decision document summarises the main points arising from the consultation and explains the basis of our decision to grant a licence to Hays in the terms in which it has been issued. In particular it explains the basis of decisions taken in relation to specific aspects of the licence especially where there have been changes from the consultation draft of the licence.

**Contact details at Postcomm**

- 1.9 If you have questions about any aspect of this document please contact Ros Poulson or Shahida Mukhtar at:

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## 2. Consultees' representations

### **Requests for further information**

- 2.1 Consignia requested clarification and further information on the Mailine service covered by the proposed licence. No other requests for information were received.

### **Universal service obligation**

- 2.2 Consignia stated that it would be contrary to Postcomm's duty to ensure the continued provision of a universal service to grant the licence in the proposed form. Consignia argued that the universal service duty means that an operator should only be licensed if the grant of the licence is best calculated to ensure the provision of the universal service. The primacy in the Act of the universal service duty over the competition duty has the effect that the duty to protect the interests of consumers "wherever appropriate" by promoting effective competition means that this is permitted only if it is best calculated to "ensuring" the universal service.
- 2.3 Consignia argued that the grant of the proposed licence would not "ensure" the universal service and actually would have an adverse effect on it. Chris Williams, a Consignia employee, also submitted that the grant would have an adverse effect on the universal service. The basis of the argument that there will be an adverse effect is that because:
- (a) the period of the proposed licence is indefinite,
  - (b) Postcomm will not be able to refuse applications for licences for other similar activities,
  - (c) Postcomm will not be able to refuse to renew licences, and
  - (d) the activities permitted by the licence are broadly defined,
- the grant of the licence would permit "cream skimming" in all industry sectors.
- 2.4 Consignia did not object to the grant of a licence for the collection and streaming of mail for genuine customers of Hays's DX service. However, it said that the conveyance of letters from customers of the document exchange service for delivery before 8am within the specified postcode districts was indistinguishable from the universal service and is "cream skimming". It estimated its potential losses from this aspect of the licence at £310 - £350 million per year.
- 2.5 Consignia argued that the proposed Mailine element of the licence would permit a service little different from that offered by First Class mail, but without a corresponding universal service obligation. It estimated the profit impact on it of licensing mail services in the six industry sectors referred to in the Mailine provisions of the proposed licence at £70m - £75m annually.
- 2.6 Hays' estimate of the maximum revenue for additional services which they will be able to offer under the licence amounts to up to £12 million over

the period of the licence. Consignia take the view that the Hays' revenue figures are a considerable underestimate.

### **Approach to licensing**

- 2.7 The Communication Workers Union (CWU) expressed the view that the proposal to grant a licence to Hays was the wrong approach at the wrong time. The CWU referred to Postcomm's consultative document on "Promoting Effective Competition in UK Postal Services" and took the view that if competition is to be introduced, the best approach would be to alter the weight and price thresholds in the licensed area as this would achieve a gradual and controlled liberalisation of the postal market place.
- 2.8 Consignia also made this point.

### **Duration of the licence**

- 2.9 Consignia are concerned that the licence is of indefinite duration and that the service restriction is not satisfactorily fixed in the licence. Consignia also suggest that Postcomm could not reasonably terminate the Hays licence.
- 2.10 Postwatch expressed concern about the short duration of the licence. This reflects Postwatch's views on the interim approach to licensing, that the short duration of licences was not an effective way of encouraging competition. Postwatch's preference is for licences more consistent with the 15 year duration of the Consignia licence.

### **Terms and conditions of the licence**

- 2.11 The CWU expressed concern that Hays' history (particularly with regard to the "cream skimming" legal action taken by Consignia) means they cannot be trusted to act within the terms of any licence granted to them. The type of competition created by the grant of a licence to Hays in the proposed terms would, in the CWU's view, be fraught with problems of definition and enforcement.
- 2.12 Consignia argued that the service restrictions in the licence were not drawn sufficiently tightly, not being limited as to potential volumes of customers and having circular descriptions.

### **Interim approach to licensing**

- 2.13 Consignia made a number of comments on the Mailline aspects of the licence in relation to Postcomm's interim approach to licensing. Consignia noted that one of the categories referred to in that policy was for existing continuing activities where there was genuine doubt as to whether or not the activity was caught by the previous regime. Consignia asserted that Hays's Mailline service was a continuing business and that it was caught by the previous regulatory regime.

### **Performance standards**

- 2.14 Consignia expressed the view that the licence should contain suitable consumer protection provisions rather than leaving this entirely to contract,

to provide equality of consumer standards. It referred to possible asymmetry with its position.

**Press notice**

- 2.15 The CWU response highlighted a discrepancy between the press notice issued with the consultation notice and the wording in the notice. The former refers to the “existing document service”, whereas the notice omits the word “existing”. The CWU believed the omission of “existing” could have significant implications and asked that the discrepancy and the true intention of the clause be clarified.

**Freedom to compete**

- 2.16 Consignia sought confirmation that it could offer competing services to those permitted by the licence provided that the prices offered cover Consignia’s Long Run Average Incremental Costs.

### 3. Postcomm's views on the representations

#### **Requests for further information**

- 3.1 Consignia were supplied with further information on the service, including revenue figures, and suggested wording of a definition of the Mailline service for inclusion in the licence.

#### **Universal service obligation**

- 3.2 Postcomm agrees with much of what Consignia says about the impact of Postcomm's universal service duty. It notes that Consignia endorses Postcomm's interim approach to licensing as a reasonable construction of what Postcomm is required to do if it is to issue licences whilst continuing to meet its statutory duties. However, Postcomm thinks that Consignia goes too far in suggesting that licensing is permitted only if it is best calculated to "ensuring" the universal service. Postcomm takes the view that if, in its judgment, the grant of a licence will have no adverse effect on the provision of the universal service it may be undertaken if it furthers Postcomm's other statutory duties.
- 3.3 With regard to the assessment of the grant of the licence on Consignia's ability to provide the universal service, we have considered Hays's projections of the additional business it might undertake on the grant of a licence and Consignia's estimates of its losses. These figures are very far apart, but only those provided by Hays seem credible in relation to the operations that Hays is proposing to undertake and in the light of the safeguards presented by the short term nature of the licence and the service restrictions in the licence.
- 3.4 We also noted that universal service carries with it requirements in relation to affordability and quality. The delivery of these aspects of the universal service is likely to be enhanced by the introduction of competition.
- 3.5 We do not accept that we are unable to refuse further licences for similar activities or to refuse to renew licences if this is necessary to ensure the provision of the universal service. Our statutory duty in relation to the universal service, following the provisions of the European Directive on postal services, makes it clear that we are able to refuse to grant or renew licences for universal service reasons. We had made this clear in our interim licensing policy so that the application of that policy would be open and transparent and would not be discriminatory.

#### **Approach to licensing**

- 3.6 Postcomm recognises that the approach suggested by the CWU is that being advocated in a number of states in the European Union. However, the Directive makes provision for other approaches such as sectoral exceptions and licensing. Consistently with these aspects of the Directive, the Act has conferred licensing powers on Postcomm; Postcomm cannot fetter its discretion to consider licence applications.

### **Duration of the licence**

- 3.7 Postcomm accepts Consignia's point that, in principle, the licence as drafted could continue indefinitely. However, provision had to be made for a point that Consignia had identified, with which Postcomm agrees, namely the difficulty of quickly running down a postal operation. There is also the possibility that settling Postcomm's longer term licensing policy might take longer than we hope. It is therefore administratively convenient to retain the flexibility of a term of one year terminable on three months' notice. Additionally, although the licence can in principle continue indefinitely, Postcomm thought that its period is so short and uncertain that it is unlikely to present an incentive to investment in additional postal capacity.
- 3.8 However Postcomm intends to write to each new licence holder, at the time of grant of an interim licence, making it clear that there can be no presumption that the licence will be renewed, and that, if a decision is taken to renew the licence, there can be no presumption as to the duration and conditions of any new licence. These will be determined at the time after consideration of what measures then are appropriate to safeguard the universal service.

### **Terms and conditions of the licence**

- 3.9 Postcomm accepts that the safeguards to the universal service that were proposed in the draft licence could be improved by tightening the service restriction condition and other provisions in the licence. We have reviewed the service restriction in detail and amended it in the light of comments made during the consultation process. A definition of Mailine has been introduced. The changes we have made are explained in detail in section 5 below. The tighter service restriction will aid enforcement of the licence.

### **Interim approach to licensing**

- 3.10 The application submitted by Hays outlines the extent to which Hays has sought to eliminate any activities that might have offended Consignia's former exclusive privilege since Hays acquired the service now known as Mailine. Consignia has not submitted to Postcomm any evidence that, if there has been any recent infringement, it is anything more than incidental. We therefore consider it appropriate to treat the Mailine element of the application, which will involve the extension of services offered to Mailine customers, as a pilot service under our interim licensing policy. We also view the other elements of the services permitted by the licence as being pilot services.

### **Performance standards**

- 3.11 Postcomm's view is that performance standards are inappropriate for interim licences which do not include a universal service element. This will be revisited when the longer term licensing policy is established, although Postcomm has no interest in regulating when the market is capable of moderating behaviour. On the matter of asymmetry, there is

considerable asymmetry in the duration of licences that is in Consignia's favour.

**Press notice**

- 3.12 Postcomm believe there is no significance in the different wording used. There is an existing document exchange service run by Hays and both the press notice and the consultation notice are referring to that existing service.

**Freedom to compete**

- 3.13 Postcomm noted that the scale of Hays's proposed operations was extremely small in relation to the scale of Consignia's activities and concluded that it was not appropriate at this stage to give Consignia the confirmation it had requested.

## 4. Postcomm's decision

### **Background**

- 4.1 In taking the decision to grant the licence to Hays, we considered the responses received to the consultation notice and advice on its scope for revising the provisions of the consultation draft. We also noted the contents of Consignia's response to Postcomm's consultation paper on promoting effective competition.

### **Assessment of impact on the universal service**

- 4.2 We had before us conflicting estimates of the effect on the provision of the universal service from the grant of the licence. We preferred the approach of Hays, which took into consideration the effect of the safeguards proposed in the licence. Hays's estimate of the value of the additional business it would conduct as a result of the grant of the licence seemed a realistic reflection of the operational issues Hays would face and amounted to a fraction of 1% of Consignia's turnover. Whilst not positively endorsing Hays's figures, We are of the view that, taking into account this anticipated level of business, and the anticipated level of business arising from other licenses that have been granted, to grant a licence with safeguards, with enhancements compared with the original draft, would not have any adverse effect on the provision of the universal service. We noted that competition could have a positive impact on the affordability and quality aspects of the universal service.

### **Safeguards**

- 4.3 We decided to make the changes described in section 5 below to the draft licence which was published with the consultation notice. These changes tighten the service restriction in the licence in order to ensure that any potentially adverse effect on the universal service that might otherwise arise is prevented. These changes, in our view, meet the substantive representations that have been made in the consultation. Specifically they restrict the extent to which business permitted by the licence can be developed and they supplement the safeguard provided by our ability to terminate the licence after a year.
- 4.4 We decided to supplement the termination provisions of the licence by specifically informing Hays in writing that there can be no presumption that the licence will be extended or renewed, and that, if a decision is taken to extend or renew the licence, Hays cannot assume that the terms will be the same. Terms and conditions appropriate at that time to safeguard the universal service will need to be included in any extended or renewed licence.
- 4.5 We considered whether it was necessary to re-consult in relation to the grant of the licence. In providing for consultation Parliament on the grant of licences must surely have intended that we are able reasonable to

respond to representations made in the consultation process. We noted that the result of the changes we were making was to restrict, rather than to expand, the activities authorised by the licence. The amended licence was well within the scope of our published proposal and we concluded that further consultation was unnecessary.

### **Competition**

- 4.6 We had no doubt that the grant of the licence will further the interests of users of postal services by promoting competition and will encourage efficiency on the part of the postal operators.

### **Ability to finance licensed activities**

- 4.7 We are satisfied that Hays can finance the proposed licensed activities and that the grant of the licence would not prevent any other licence holder from financing the activities authorised or required by its licence.

### **Decision**

- 4.8 We concluded that to grant an interim licence to Hays in the terms amended as described in section 5 is a proper exercise of our functions under the Act in that it would have no adverse effect of the provision of the universal service and would further our duty in relation to the interests of consumers and competition. We therefore decided to grant the licence.

## 5. Key changes to the consultation draft licence

### **Summary of key changes**

- 5.1 The changes made to the consultation draft licence fall into 3 areas:
- Generally tightening of the wording in Condition 2 – service restriction,
  - The introduction of a definition of the Mailine service, and
  - A restriction on the availability of the Mailine service to named customers only.

### **General tightening of the service restriction**

- 5.2 Postcomm recognises that as originally drafted the service restriction was too broad in two respects. First it permitted letters to be conveyed more generally than was necessary for the purpose of the application. For example, the first part of the service restriction needed to permit collection, but as drafted it permitted conveyance subsequent to collection. Secondly, in relation to the element of the service restriction dealing with delivery before 8.00 am in certain postal districts for document exchange customers, the licence did not make clear that the service authorised is a next day delivery service.
- 5.3 Postcomm therefore has modified the drafting of the service restriction to narrow it in these areas.

### **Mailine service definition**

- 5.4 Postcomm noted Consignia's concerns at the breadth of the service restriction in relation to the Mailine aspects of the application, as that service was referred to in the draft licence. Postcomm thought it appropriate, in response to those concerns, to introduce a definition of the Mailine service. The definition is in condition 1 of the licence that has been issued and it is based on the view that Mailine is predominantly a business to business service for the conveyance of time-critical goods and other items. If, in due course, an application is received to extend this aspect of the licence, it is likely to be necessary to review the definition. Postcomm regards the definition it has developed as adequate for the purpose of an interim licence, given the limited duration of the licence. Draft wording for this definition was provided to Consignia during the consultation period and no subsequent representations were received from Consignia.
- 5.5 Postcomm did not accept Consignia's view that Mailine differed little from first class mail. The requirement that the service is for business customers, pre 8am delivery, tailored collection and delivery times, and the customer support service provided through Mailine appear to be real enhancements compared to Consignia's first class service.

### **Availability of Mailine service**

- 5.6 In addition to defining the Mailine service, Postcomm thought it appropriate to restrict the availability of the Mailine services that may be provided under the Licence to existing named customers of the service only. This restriction was introduced in response to the suggestion that the volume of business that might be done under the licence was not adequately contained by it. Customers are named within the licence and changes can be made to the customer base only through the licence modification process.

### **Overall assessment of safeguards**

- 5.7 Postcomm noted that the service restriction condition supplemented the short term of the licence as a safeguard against any potential adverse effects on the provision of the universal service and concluded that together they should be adequate for that purpose.

## Appendix 1

Responses to the consultation notice were received from the following bodies/individuals:

1. Daphne Bampton
2. Communication Workers Union (CWU)
3. Consignia plc
4. I.F.L. Pen Friends UK
5. Postwatch
6. Chris Williams, International Cashiers Administration, Consignia plc