

**EXCEPTIONS UNDER SECTION 7 OF THE POSTAL
SERVICES ACT 2000**

DECISION DOCUMENT

MARCH 2002

Summary

On 25 October 2001, the Postal Services Commission ("Postcomm") issued a consultation paper on a proposal to recommend to the Secretary of State for Trade and Industry that modifications should be made to section 7 of the Postal Services Act 2000 ("the Act") to provide three additional exemptions to the need for a licence to convey letters covering –

- o The courier and sorting services required by CRESTCo,
- o Poll cards in certain elections, and
- o Candidates' addresses to voters in certain elections.

The representations made in response to the consultation paper have been very helpful to Postcomm. Postcomm has decided to recommend an exemption for CRESTCo to the Secretary of State broadly as proposed, although for revised reasons and with modifications to simplify it.

In relation to the election exemptions, Postcomm has decided not to proceed with its proposed recommendation at this stage. Postcomm intends to seek clarification from the Department of Trade and Industry and from the Department of Transport Local Government and the Regions as to the optimum scope for any modification. Postcomm then may re-consult on the proposal when an opportunity to do so arises.

This document summarises the main points of the responses to the consultation, sets out Postcomm's views on those points and explains the reasons for Postcomm's decision.

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1. Introduction

Purpose of this document

- 1.1 This document explains the outcome of a consultation process recently undertaken on the proposed modification of the exemptions in Section 7 of the Postal Services Act 2000 ("the Act") and outlines the background to the decision taken by the Postal Services Commission ("Postcomm") to recommend one of the exemptions it proposed to the Secretary of State for Trade and Industry with some modifications, but not to proceed with the others.

Background

- 1.2 On 26 March 2001 the new regulatory regime for postal services established by the Act came into force. Section 6(1) of the Act sets out the prohibition against conveying letters without a licence. It is supported by both criminal and civil enforcement provisions. Section 7 of the Act sets out a number of exceptions to the need for a licence which otherwise is required under section 6. Section 7(1) excepts letters conveyed in consideration of £1 or more or weighing 350 grams and over. Section 7(2) lists a number of specific exceptions. The providers of services which fall under section 6 and are not exempt under section 7 require licences.
- 1.3 Section 8 of the Act provides that exceptions in section 7 may be modified by order of the Secretary of State. Such orders may only be made on the recommendation of Postcomm and Postcomm must have consulted with Postwatch, licence holders and such other persons as it considers appropriate before making a recommendation. When a recommendation is made, the Secretary of State must either modify the Act, which is done by statutory instrument, or report to both Houses of Parliament on

her reasons for not doing so.

1.4 On 25 October 2001 Postcomm issued a consultation document with a view to making recommendations to the Secretary of State on modification of the exceptions to the need for a licence to convey letters. The proposed exceptions were for –

- Mail arising as part of the settlement system operated by CRESTCo for UK, Irish and international securities;
- Conveyance of poll cards for Parliamentary, Assembly and county and district council elections; and
- Conveyance of other material for Parliamentary and Assembly elections.

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2. The CRESTCo exception – background, consultees’ representations and Postcomm’s views

2.1 This chapter outlines the background to the proposed exemption for the CRESTCo Courier and Sorting Service (CCSS). It then summarises the main points raised by respondents on the proposal and sets out Postcomm’s views on those points, where this is necessary. A final section explains Postcomm’s conclusion that it should recommend an exemption to the Secretary of State, subject to simplifying the drafting of the original proposal.

Background

- 2.2 Postcomm proposed this exemption because –
- o the CCSS is a service of great significance to the UK economy that is closely regulated under the Financial Services and Markets Act 1998,
 - o additional regulation under the Act appears to add safeguards that are unnecessary, given that the past provision of the service has had no adverse effect on the provision of the universal service, and
 - o there was a lack of clarity as to the position of CCSS under the Act.

Consultees’ representations and Postcomm’s responses to them

Postwatch

2.3 Postwatch agreed with the proposal to recommend the exception. It noted that the service had been provided by an operator other than Consignia for five years without adverse effect on the provision of the universal postal service.

2.4 Postwatch also commented that the licensing regime implemented under the Act should not adversely affect services which had been carried out prior to its implementation and should certainly not impose greater regulatory burdens without very good supporting reasons. The additional costs and regulatory burdens, which would be imposed if this activity were to be licensed, would not appear to add any significant benefits. Postcomm accepts this point.

The Federation of Small Businesses

2.5 The Federation of Small Businesses supported the proposals, commenting that they appear eminently sensible and fall under the heading of tidying up the housekeeping.

The National Federation of SubPostmasters

2.6 The National Federation of SubPostmasters made a number of points that are covered below with those of Consignia.

The CWU

2.7 The CWU did not comment on the proposed exemption for CCSS.

CRESTCo

2.8 CRESTCo made comments supportive of the proposal and in response to the points made by Consignia.

Consignia

2.9 Consignia questioned whether there should be an exemption for CCSS so as to avoid CRESTCo being subject to two regulatory regimes. Consignia pointed out that many companies are subject to more than one system of regulation and saw no justification for a postal regulation exemption because a company was licensed to carry on a wholly unrelated business. In Consignia's view the exemption could be discriminatory and

there was no reason why Postcomm should discriminate in favour of CRESTCo. The National Federation of SubPostmasters (NFSP) expressed similar views.

- 2.10 Consignia suggested, in relation to possible disadvantage to CRESTCo if it wanted to terminate its contract with TNT, that CRESTCo should be in the same position as every other user of letter post within the reserved area. The NFSP expressed similar views.
- 2.11 Consignia commented on the statement in the consultation document that the TPG Post Group (TPG) (which operates the CCSS through its subsidiary TNT UK Ltd (TNT)) considered that its activities were permitted under the British Telecommunications Act 1981 but were (or may be) prohibited by section 6 of the Act. Consignia stated that since section 7 of the Postal Services Act is principally a re-enactment of the exceptions from the monopoly which were contained in the earlier legislation, if TPG were right in assuming that their activities were not exempt, then Parliament had, in enacting section 7, re-introduced restrictions upon these activities. Whilst Consignia appreciated that these requirements could be removed by Order in accordance with section 8 of the Act, Consignia took the view that Postcomm should have a more cogent justification for reversing Parliament's intended scope of the licensing requirements so soon after the provisions came into force.
- 2.12 Finally, in relation to CRESTCo, Consignia questioned whether it was correct to grant an exemption in order to address an uncertainty in the scope of section 7(2). In Consignia's opinion operators should take a view on the scope of an exemption, leaving it to the courts to make a ruling if there is any dispute.

TPG

- 2.13 TPG which currently holds a short term licence through its subsidiary TNT to enable it to provide the CCSS for CRESTCo, believed that to include a requirement of national importance for granting an exception could create an inappropriate precedent which might seriously limit the granting of further exceptions. Whether the service is of national importance was, in the view of TPG, not a relevant consideration under the terms of Postcomm's statutory duties. TPG characterised the CRESTCo service as "a specialist dedicated service for a defined group of users who need timed delivery not offered by the conventional postal service". There are many customers with requirements for such a service that are not provided by Consignia as part of its standard service and TPG believed that these too should be excepted from the obligation to obtain a licence whether or not there are issues of "national importance".
- 2.14 TPG commented on the extent to which non conventional postal services may be subject to licensing, citing the 1997 EC Postal Directive and a letter dated 6 December 2001 from Paul Waterschoot of DG Internal Markets at the European Commission. TPG held the view that requiring a licence to provide non conventional postal services is contrary to European law and constitutes an unjustified and disproportionate restraint on trade. TPG believed that an exception should be granted for all such services and argued that the very most European law permitted the UK to impose on non conventional postal services was a general authorisation. Such an authorisation could only include conditions that are necessary to ensure the fulfilment of the "essential requirements" described as general non economic reasons inducing a Member State to impose conditions on the supply of postal services. TPG believed that Postcomm was not

permitted to impose any other obligations on providers of non conventional postal services.

- 2.15 TPG also commented that although they supported the proposal that the CCSS be formally excepted from the licensing obligations, this course of action simply added to the piecemeal set of exceptions to the licensing obligation. As a result Consignia would retain its artificial advantage when competing for special mail service business from all other customers. In TPG's view, as long as there was confusion about the legality of such services and the requirement to obtain licences, then Consignia's artificial advantage would be unlawfully prolonged in the market for non conventional postal services.

Postcomm's Views

- 2.16 We have reflected carefully on these points. Our views on them are set out by reference to the main topics raised by respondents to the consultation proposal.

Dual regulation

- 2.17 Postcomm accepts that there are many instances of companies being subject to dual systems of regulation. Postcomm also recognises the force of Consignia's point that it is difficult to justify exemption from one area of regulation because a company is licensed to carry on a wholly unrelated business. Postcomm agrees that if avoidance of dual regulation was the only reason for exemption it would be difficult to argue against applications for exemption from other companies subject to other regulatory regimes.
- 2.18 CRESTCo is an unusual example of a regulated company. Its business is as the official provider of part of the infrastructure for the financial services industry's markets, rather than of being a participant on those markets; it is regulated under the Financial

Services legislation both as a clearing house approved by the Financial Services Authority and through being approved by the Treasury under the Uncertificated Securities Regulations 2001. CRESTCo has very few comparators.

- 2.19 Reducing unnecessary regulatory burdens on business is desirable. However, Postcomm thinks, on reflection, that, avoiding dual regulation is not, of itself either a necessary nor a sufficient justification for exemption. In the light of the comments that have been made in response to the consultation by Consignia and others on this point, Postcomm does not seek to base its decision in this case on the argument that an exemption is justified by the need to avoid dual regulation.

CRESTCo's position as a user of postal services

- 2.20 Consignia's comments on CRESTCo as a user of postal services have caused us to reflect on whether it is a user of postal services or an organisation with a legal duty to be a provider of postal services. We think that it can be regarded to some extent as a provider of postal services and accordingly we have reviewed whether, if it is to have special treatment, it should be licensed rather than excepted. We think that where persons asking for special treatment are, to a significant extent, operators rather than users, licensing generally will be most appropriate way of accommodating their needs. However, the element of postal operation in CRESTCo's business appears to be insufficient for it to be considered for a licence rather than for an exception.
- 2.21 Consignia's comments also have caused us to reflect on the risk, if special consideration is given to one user, that Postcomm will be less able, if necessary, to argue firmly against other requests for special treatment. This makes it attractive to accommodate special circumstances through licensing, whenever the applicant

can be seen as an operator rather than as a user, rather than through exception, even though we think that such an approach is not appropriate for CRESTCo. In relation to CRESTCo, we think that Consignia's response, in suggesting that CRESTCo should be in the same position as every other user of the letter post within the reserved area, overlooks the particular needs and duties of CRESTCo. Other users are not required by law, as CRESTCo is under the Uncertificated Securities Regulations 2001, to have a postal service that has features not offered as part of the normal letter post.

Reversing Parliament's intended scope for licensing

2.22 We think that Consignia's comments on the position of CCSS under the 1981 Act may not reflect fully the way in which the CCSS was provided in the past. Under the 1981 Act there was no power to grant individual licences and it would appear that the matter was felt not to warrant specific exception. However, the provision of the CCSS was dealt with by a letter of comfort issued by the DTI. The outcome of this state of affairs was that there was no statutory exception for Parliament to re-enact, although there was a clear administrative provision under which the CCSS could be provided.

2.23 The position of the CCSS did not feature in the debate in Parliament on the Postal Services Bill, so there is no clear indication of Parliament's intentions in relation to it. Parliament was enacting a regime for postal services under which postal services could be licensed or excepted from the day when the Act came into force, a point which was noted by Consignia. Parliament cannot be said to have anticipated that these powers would not be used for a period of time. We therefore doubt if it can be said that our proposal is effectively reversing Parliament's intended scope of the licensing regime.

Resolving uncertainty

2.24 Postcomm has difficulty with Consignia's view on the correct way to address questions as to uncertainty in the scope of section 7(2) of the Act. If Consignia's approach were to be followed in this case, Postcomm (subject to any decision it might take on the grant of a licence) would leave uncertain the legality of an activity that had, in practice, been taken out of Consignia's monopoly some time ago. We note that Consignia did not recommend that Postcomm should leave uncertain the situation that applied to collection for outbound cross-border mail, which appeared to have been re-reserved by the Act after being liberalised for several years in practice. Moreover, the restrictions on competition that are permitted in the postal sector in order to safeguard the provision of the universal service must be no more than are necessary for that purpose. Given that the past conduct of the activity has not prevented the universal service from being provided, it seems to Postcomm to be difficult now to justify restricting it. The balance of the duties that Postcomm must discharge appears rather to point to opening up this activity to competition.

National importance

2.25 Postcomm's reference to the national importance of the CCSS in proposing this exception did not mean that national importance is a necessary condition for exemption. In this case we saw national importance, with other factors, as providing a sufficient reason for exemption. But we did not see a decision in this case as creating a precedent requiring all future proposed exceptions to have to establish national importance.

2.26 However, on reflection we think that national importance is a difficult criterion to apply. There are many other activities, apart

from the CCSS, that could be said to be of national importance, such as conveying letters from Government departments, the courts and other authorities to third parties. Some of them could be said to carry a stronger justification for exception than the CCSS. Assessments of national importance are not easy to make objectively and they give rise to the possibility of increasing leakage of postal items from the regulated sector in a manner that is difficult to forecast. This could, in the short term, put at risk the matter of national importance that Postcomm required to safeguard, the universal service.

European law

2.27 Postcomm thinks that the establishment of licensing regimes under the European Directive is rather more complex than TPG has suggested. There are difficult issues as to the definition of services that are “outside the scope of the universal services” and therefore outside the scope of licensing. It also is clearly the case that the CCSS is likely to be conveying letters within the meaning of the Act so that as a matter of domestic law a licence or an exemption is required if CCSS is to be provided in a manner that complies with the Act. In this case, however, Postcomm is proposing to take a service outside the scope of licensing by an exemption and the points that TPG has made do not indicate that this step should not be taken. They suggest, on the contrary, that Postcomm should go further and exempt other services.

Piecemeal exceptions

2.28 In the period since the publication of our proposals for the CRESTCo and elections exemptions, we have published our proposals for introducing competition into the postal services market in the UK on a long term basis. Postcomm will take a final

decision on this policy in a few weeks. Assuming that no impediment arises to the adoption of its proposals, Postcomm anticipates that any argument that there may be for criticising the UK's approach to exemptions as piecemeal will be addressed as those proposals are rolled out. Until then it is inevitable that Consignia has some artificial advantages: the basis of postal policy for very many years has been Consignia's monopoly and Postcomm's view is that an adjustment period is necessary in moving from monopoly to full competition.

Conclusions

- 2.29 Opposition to the proposal to exempt the CCSS was expressed by Consignia and the NFSP, with other respondents either expressing no view or being supportive of the proposal. TPG was supportive of the proposal but critical of the reasoning for it. There was no suggestion in either of the opposing responses that the exemption would have an adverse effect on the provision of the universal service, but there was a clear argument that the case for exemption needed to be more cogently justified.
- 2.30 Postcomm's conclusion, after considering the points made to it by respondents is that it should recommend an exception for CRESTCo's CCSS, but for different, and perhaps narrower, reasons than those set out in its consultation proposal. Postcomm notes that provision of the CCSS was taken outside the scope of the earlier legislation on an informal basis a number of years ago. In that time the service has been provided without detriment to the universal service. Postcomm thinks that CCSS should be regarded, under the Act, as something that simply was overlooked in the passage of the Postal Services Bill, in the same way that collection for outgoing cross border mail was

overlooked. The clear intent behind the Act was to carry forward existing exceptions and from that basis to introduce a licensing regime. The intent of the Act does not appear to Postcomm to have been to re-reserve any services. In the words of the Federation of Small Businesses an exception for the CCSS is a matter of tidying up the housekeeping.

- 2.31 Postcomm also thinks that no decisive argument has been presented against the proposal.
- 2.32 For these reasons Postcomm has decided to propose to the Secretary of State that an exception is provided for the CCSS. Postcomm thinks that these reasons provide the more cogent justification for the proposal that Consignia argued was required.
- 2.33 In reconsidering this issue, Postcomm has been able to reformulate, in a simpler manner, the wording that it proposes to suggest to the Secretary of State in order to give effect to the proposal. That revised wording is the last chapter of this decision document.

3. **The exemption for election material – background, consultees’ representations and Postcomm’s views**
- 3.1 This chapter outlines the background to the proposed exemption for poll cards and election material. It then summarises the main points raised by respondents on the proposal and sets out Postcomm’s views on those points, where this is necessary. A final section explains Postcomm’s conclusion that it should not recommend an exemption for election material.
- 3.2 In addition to responses from organisations in the postal industry, Postcomm received detailed responses from organisations closely involved in the conduct of elections. Postcomm is particularly grateful for their comments on what is a difficult specialist issue.

Background

- 3.3 Postcomm proposed an exception for poll cards for Parliamentary and other elections and for candidates’ addresses in Parliamentary elections at the request of the Department of Transport, Local Government and the Regions (DTLR). The proposal was made following the occurrence of industrial action at the time of the last general election as a result of which some Returning Officers had to make emergency arrangements for the distribution of poll cards. There was a question as to the legality of these arrangements under the Act and examination of that difficulty suggested that long standing practices in some areas for the distribution of poll cards might not be within the exemptions provided in the Act. Postcomm thought that an

exemption to resolve these issues was in the interests of users of postal services, in ensuring that they have the information they need to vote, which is of vital importance in a democratic society.

Postal sector comments

TPG

- 3.4 TPG supported the proposed exemption and urged Postcomm to consider the fuller picture and provide a general exception in the event of Consignia failing to provide a universal service. TPG outlined the limited range of services that could be provided without committing a criminal offence when Consignia's service fails and suggested that there was a conflict between Postcomm's present exemption proposal and the approach it adopted over the Deya licence which could operate only when there is disruption to Consignia's services.
- 3.5 Postcomm is considering more generally what measures it should have available in the event of industrial action but sees no reason to delay proceeding with an important initiative in one area (elections) because consideration of the fuller picture has not been concluded. Postcomm does not see a conflict with the approach it adopted in relation to the Deya licence. In that case Postcomm was responding to an application under its interim licensing policy and its aims, in respect of both that application and the election exemption proposal, are consistent: the provision of services to users in the event of disruption to Consignia's services.
- 3.6 TPG doubted whether an issue being of vital importance in a democratic society is a relevant consideration for Postcomm. Postcomm is of the view that it may be in the interests of users of postal services, and therefore within its powers, to propose

changes that address such issues. This does not mean that it is a necessary condition for proposing an exemption that such an issue needs to be resolved. But such an issue can provide a sufficient reason for action.

CWU

- 3.7 The CWU acknowledged that in the weeks before the parliamentary election in June 2001, parts of the postal service suffered disruption as a result of industrial action. The CWU highlighted its continuing role in working closely with Royal Mail to overcome the fundamental industrial relations issues facing the postal service, highlighted in the findings of the Sawyer report.
- 3.8 The CWU agreed that it was essential that the electorate had the information it needed in order to vote and that this was of vital importance to a democratic society. This was why the CWU acted to find out why there had been disruption to the delivery of election material and was endeavouring to ensure that the reasons for these disputes were rectified by agreeing a national policy with Consignia on the rewards to staff for the delivery of such material. The aim was to have this in place prior to the London and local elections in May 2002.
- 3.9 The CWU suggested that public confidence in the delivery of poll cards is best achieved if delivery continues to be undertaken by Royal Mail, because of the safeguards provided by condition 8 of Consignia's licence. It also suggested that if there was disruption to the universal service which interfered with the delivery of election material, then Postcomm could recommend a temporary exception order for any postcode area affected by postal disruption. The CWU believed it was both wrong and unnecessary for additional measures to be put in place when there were already existing remedies at Postcomm's disposal.

- 3.10 We have considered the practicality of CWU's proposal for recommending exceptions for election material under section 8 of the Act on a temporary basis as and when industrial action may occur. However, the time for the processes involved to be followed is a long one, involving the approval of statutory instruments by both Houses of Parliament. Given the short time scales in which unofficial action can arise (and did arise at the time of the last general election) the most practical approach is to have the exception in place at all times.
- 3.11 The points made by the CWU about Consignia's mail protection procedures do not seem to us to be persuasive. If Consignia's service is not being interrupted, then Returning Officers and candidates are likely to want to use it because of the arrangements under which it is provided free to them (although Consignia is reimbursed for providing it). If Consignia's service is disrupted, so that it cannot be used, the fact that it is secure is not relevant.
- 3.12 The CWU response does not deal with the issue of the current practice of hand delivery of election items in some areas.

Consignia

- 3.13 Consignia were concerned that the exemption proposal in relation to poll cards had been made in order to clarify the scope of section 7(2) of the Act. It preferred there to be no exemption, leaving it to operators to take their own view, with rulings by the court in the event of dispute. Consignia said that to proceed with this proposal would result in a continual narrowing down (sic) of the scope of the exceptions in section 7(2). The introduction of the exemption for the delivery of poll cards may call into question the legitimacy of activities of other unlicensed commercial organisations which currently collect, convey or

deliver letters relying on the exemption in section 7(2)(i), which covers the conveyance of letters by a person who has a business interest in those letters.

- 3.14 Postcomm thinks that people taking part in good faith in facilitating the processes of democracy surely ought not to be subject to the risk of criminal proceedings without very good reason. Postcomm finds it difficult to see the possible calling into question of the legitimacy of the unparticularised activities of unspecified organisations as providing that reason. Nor does the safeguarding of the universal service provide that reason in this case: if Consignia is providing a service it will, in most cases, be used because it is free; if Consignia's service is disrupted it will be losing no revenue because of the exception; elections are not an every day event and the informal arrangements that would be legitimised by the proposed exemption have not, in the past, had any effect on the universal service.
- 3.15 In relation to the delivery of candidates' election communications, Consignia argued that since candidates only had a right to free postage if the universal service provider was used, there was little point in removing the licensing requirement as Consignia was the only free option. Postcomm thinks that this misses the point of the proposed exemption which is to avoid a situation in which candidates have no option at all, for free or for payment, in the event that Consignia is unable to provide a service. However, the point raised by Consignia is relevant to the assessment of universal service effects. Because Consignia's service is free to users, it is unlikely to lose this business at all, provided that its services are working, as a result of the proposed exemption. Therefore there is likely to be no adverse universal service effect.
- 3.16 Consignia drew attention to the wording of section 91(1)(a) of

the Representation of the People Act 1983 to which this exemption proposal relates. This entitles candidates to post "one unaddressed postal communication, containing matter relating to the election only and not exceeding 60 grammes in weight, ...". The definition of "letter" in the Postal Services Act excludes unaddressed items, therefore Consignia argued that an exception should not be required for this activity.

- 3.17 We are grateful to Consignia for identifying this point. On reconsidering the 1983 Act, we note that section 91(1) offers two alternatives to candidates: in paragraph (a) an unaddressed communication and in paragraph (b) an addressed communication. The latter of these alternatives is a letter, so we think that the need for consideration of an exemption remains and that the way to accommodate it in an exemption is to refer simply to section 91(1) of the 1983 Act and not to section 91((1)(a) in any order that may be made.

Postwatch

- 3.18 Postwatch thought that the proposed exemption for election material, and the recent grant of a licence to Deya Ltd, should be seen as examples of new services outside the scope of licensing. We have discussed the difficulties of defining what services are, or are not, within the scope of the universal service, and therefore within the scope of licensing under the European Directive, in the previous chapter in the section dealing with the comments made by TPG. In a domestic context the delivery of poll cards and other election material is within the scope of the Act, so Postcomm has no doubt that either a licence or an exemption is required for their conveyance.
- 3.19 Postwatch agreed that the proposed exemptions would have no effect on the provision of the universal service. Postwatch also

agreed that it was important that the electorate had the information it needed in order to vote in a democratic society and that the option of distribution by hand should not be the subject of legal doubt.

3.20 Postwatch agreed that an exception should be made for the conveyance of election material in the event of disruption to the universal service. However, Postwatch argued that the exception should be extended to cover local election material as well. In Postwatch's view, the fact that general election material was conveyed free of charge, and local election material was not, was irrelevant to the decision as to whether the exception should be extended to cover local election material. Alternative forms of communication were available equally for general and local elections. Postwatch argued that although the provision for local election material to be conveyed free of charge had not been proposed, this material remains important. Voters should be able to receive this information via the postal network if this was considered to be the most appropriate form of communication. The relevance of removing any legal doubt concerning distribution by hand was, in Postwatch's view, also therefore applicable to local election material. Postwatch suggested that although DTLR has not asked for the exception to cover this, Postcomm should use this opportunity to widen the scope of the exception to cover local election material.

NFSP

3.21 The NFSP was concerned that the removal of the licensing requirement for the distribution of election material represented a further removal of profitable work from Consignia. The opening up of the postal services sector to competition was, in the view of

the NFSP, resulting in a trend where alternative companies provided services to the niche, more profitable, markets. This cherrypicking behaviour undermined Consignia's finances and in turn further financial pressure on Consignia undermined the company's ability to support the universal service, uniform affordable public tariffs and the national network of sub post offices. Threats to the universal service and the network of local post offices threatened those that needed the service most – older people, disabled people, those on low incomes and people living in rural and deprived areas.

3.22 We understand the concern raised by the NFSP, but we noted in the consultation document that the effect of the proposed exemptions on the universal service would be neutral and we maintain this view. Because Consignia's provision of election services is free to its users, other means of delivering poll cards and election addresses will only be widely used if there is disruption to the Consignia's service, when Consignia will not be in a position to earn income from the service anyway. Whilst we accept that in some cases when industrial action occurs, mail will still be sent once the disruption is over, we do not believe this applies to election material since this is time critical. Instead, the alternative delivery methods already employed by some local authorities are likely to be more widely used. We note that no other respondents, including Consignia, raised concerns about a possible impact on the universal service.

3.23 The NFSP accepted the importance of poll cards being received in time for relevant elections, but argued that systems needed to be put in place so that essential infrastructure, including the democratic process, did not collapse in the event of industrial action. Although Consignia had experienced industrial action in the past it did not mean that it would in the future, nor was it the

case that any alternative postal delivery services would not be affected by industrial action. Consignia would be well placed to cover the postage and as a large organisation had reserves of staff that could be brought in to cover the eventuality of industrial action.

- 3.24 We agree that there should be no presumption that there will be industrial action in the future. However, prudence suggests that we should consider contingency plans to cover the possibility of industrial action, and this is one of the purposes of the exception. Experience at the time of the last general election suggested that Consignia were not in a position to handle the delivery of poll cards when industrial action occurred. Whilst other operators may also experience industrial action, the creation of this exception will enable local authorities to have the widest possible choice of operators, so being in a position to avoid those experiencing industrial action.
- 3.25 The NFSP highlighted the fact that, currently, election material was distributed by a national centralised accountable body, Consignia. The NFSP understood that election material was vetted by Consignia to ensure that it met legal criteria. The NFSP was concerned that to deregulate the distribution of election material ran the danger of undemocratic influences on the process. Postcomm doubts very much if this is a significant issue: Returning Officers appear to Postcomm to have the experience needed to select suitable alternative service providers. There is no reason to suppose that candidates in elections need to have their material vetted. If alternative service providers want to vet candidates' addresses to safeguard themselves, for example against defamation proceedings, they can stipulate this in their terms of contract.

Representations from organisations concerned with the conduct of elections

National Assembly for Wales

- 3.26 The National Assembly for Wales commented on the suggestion in the consultation document that candidates might, in the event of service disruption, look to their party machinery for the delivery of election addresses. Their view was that this was unlikely because, while enlisting party workers to carry out the task might have no monetary cost to the candidate, it would mean removing those workers from other tasks. And candidates could not in extremis make arrangements to pay for the distribution themselves without this counting against their (tightly regulated) election expenditure. In such circumstances, it was suggested that candidates would look to returning officers to set up alternative free delivery arrangements. In the view of the National Assembly for Wales, this did not remove the need to establish an exception, it reinforced it.
- 3.27 The National Assembly for Wales also stated that while poll cards and election addresses were not strictly vital to the conduct of elections to the Assembly, failure to deliver them would seriously imperil the chances of an efficiently conducted and well-informed poll. Postcomm sees the force of these points made by the Assembly.
- 3.28 The National Assembly for Wales agreed that there was no basis for extending the exception to cover election addresses for local elections. They stated that, as the consultation document implied, there was no statutory provision for candidates in such elections to circulate an address free of charge, so there was no need to provide an exception to cover this.

Clackmannanshire Council

- 3.29 Clackmannanshire Council thought that polling cards for all elections should be covered by an exemption. They also thought that candidates' communications should be covered by an exemption under the Act. They advised that as from 2003, it was likely that Scottish local government candidates would also be entitled to deliver to every elector, individual communications. They therefore suggested that the exemption should cover every UK election conducted under the Representation of the People Act. Clackmannanshire Council did not agree with Postcomm's rationale for not extending the exemption to include local elections.
- 3.30 Clackmannanshire Council also drew attention to the issue of communications and ballot papers relating to Community Council and School Board elections. The latter required the delivery, to every person registered, of a notice of election. This often took the form of a card similar to a poll card, or an enveloped letter, depending on the arrangements adopted by each Council. Some of these were delivered by hand or other means.

The Association of Electoral Administrators

- 3.31 The Association of Electoral Administrators supported the proposed exemptions for election material. However it queried whether the provisions in Regulation 76 of Representation of the People Regulations 2001 also needed to be included in the exemptions. This regulation provides for postal ballots and permits a Returning Officer to use for their despatch:
- a) a universal postal service provider
 - b) a commercial delivery firm
 - c) clerks appointed under rule 26(1) of the elections rules

This issue was also raised by Clackmannanshire Council and the National Assembly for Wales, who commented that given that postal votes were now much more freely available, any disruption to the delivery and receipt of postal ballot papers could have an impact on an election which was almost as serious as disruption to the delivery of poll cards.

Comments from other respondents

- 3.32 The Federation of Small Businesses supported the proposals, commenting that they appeared eminently sensible and fell under the heading of tidying up the housekeeping.

Conclusions

- 3.33 The responses to the consultation on election exemptions have highlighted a number of issues in relation to our proposals. These issues arise from the narrow scope of the exemptions that Postcomm was asked to consider. It is clear from the comments we have received and our consideration of them, that the exemptions as we proposed them did not deal with elections for –

- o The European Parliament,
- o The Greater London Authority,
- o Parish and community council elections, and
- o Scottish School Board elections.

- 3.34 Our proposals also did not deal with the possible occurrence of difficulties in the conduct of referendums and make no provision for the despatch and receipt of postal ballot papers, which would appear to be just as important as poll cards for the voters who want them.

- 3.35 The consultation has also brought out suggestions that the delivery of candidates' addresses to electors in local elections

ought to be dealt with on a basis that is free to candidates, as in the case of Parliamentary elections.

3.36 Postcomm's views on these issues are as follows.

- o The responses to our consultation paper confirm us in our view that it is in the interest of users of postal services that they have the information they need to vote and for us to take steps to remove any potential impediments to the democratic processes they are entitled to participate in, to the extent that we are able to do so.
- o This argument applies not just to the elections referred to in our original proposal, but more widely to the other elections referred to by respondents. Broadening the scope of the exemption that we proposed appears to us to be entirely sensible and desirable in the interests of users of postal services who are entitled to expect to be able to participate in democratic processes with the minimum of interruption.
- o We are confident that there are no universal service reasons for declining to proceed with the exemptions in the terms in which we proposed them and in the broader form we now think is appropriate. The arguments which have emerged in consultation which confirm this view, in particular the fact that Consignia's services are free to users for most of the services in question, also apply to much of the election material not covered by our proposal. Where this is not the case (distribution of candidates' addresses in local elections and postal ballots) we find it impossible to conclude that there would be significant adverse universal service effects as a result of widening the proposed exemption to include the

material in question: the very intermittent nature of the “elections market” means that it is small and one that is unlikely to be attractive to commercial competitors.

- o Whether candidates in local elections should have the facility for free distribution of statements to electors is a matter for Parliament. However, the fact that candidates do not presently have this right is not relevant to addressing the issue that they cannot presently organise a distribution at all in the event that Consignia’s services are disrupted, without some risk of their helpers being liable to criminal proceedings.

3.37 Despite these views, we think that it would not be right for Postcomm to recommend to the Secretary of State that the broader exemption we now think is appropriate. This is because to make a recommendation for change that is significantly broader than the proposal on which we consulted raises the possibility that a proper consultation has not been conducted in relation to the recommendation as is required by section 8 of the Act. The interests of users of postal services and of postal operators will not be served well by a modification to the Act that is open to challenge because proper procedures have not been followed.

3.38 Given that we think that a broader proposal is required than the one on which we consulted, we think that it would not be sensible to make a recommendation for the narrow modifications that we originally proposed. If we were to do so there would need to be two sets of modifications to the Act, each one requiring a decision by both Houses of Parliament. We think that the better approach is to re-consult on a broader proposal and make a recommendation on that in due course (subject to the outcome of the second consultation). We

anticipate that a re-consultation can be carried out quite quickly.

3.39 However, before a further consultation exercise is commenced, Postcomm intends to discuss with the Department of Trade and Industry and with the Department of Transport, Local Government and the Regions precisely how broadly they think an exemption to section 6 of the Act for elections should be framed. They may choose to involve the Department of Education and Skills. The narrowness of Postcomm's original proposal reflected the terms of the approach it received to propose a modification. The implications of the responses to our consultation go beyond our role as regulator of postal services and we have no doubt that it is for others, rather than for us, to take the lead in deciding what the underlying policy in relation to election material should be.

4. Postcomm's decision and the next steps

4.1 On the basis of the conclusions reached in the preceding chapters of this paper, Postcomm has decided to recommend the Secretary of State to modify section 7 of the Act to introduce a new exemption for the CCSS operated for CRESTCo from the prohibition against the conveyance of letters without a licence in section 6 of the Act. Postcomm has decided to make no recommendation in relation to elections.

4.2 In relation to the recommendation for the CCSS, Postcomm is confident –

- o That there will be no adverse effect on the provision of the universal postal service in the United Kingdom, and
- o That there will be a furtherance of the interests of users of postal services.

Postcomm therefore is proposing the exemption in the discharge of its statutory duties.

4.3 Postcomm's recommendation is for the introduction in section 7(2) of the Act of an additional sub section having the effect that–

“Section 6(1) of the Act is not contravened by the conveyance, including the incidental functions of receiving collecting and delivering, through a system of postal services established for the purposes of the Uncertificated Securities Regulations 2001 by or on behalf of the operator of a relevant system within the meaning of those Regulations, of any letter which is sent –

- (i) for the purposes of –
 - (aa) those regulations, or
 - (bb) that operator in the capacity of a recognised clearing

house within the meaning of section 285 of the Financial Services and Markets Act 2000, or

- (ii) in connection with the holding or transfer of securities within the meaning of section 207 of the Companies Act 1989 or with the grant or exercise of any power or right relating to any such security."

4.4 The wording of this proposed modification differs from that which was originally proposed in that the first paragraph has been simplified. In suggesting drafting to give effect to its proposal, Postcomm does not intend to be prescriptive. The recommendation to the Secretary of State will be for a modification to the Act having the effect of the drafting suggested above. Postcomm will be content with any alternative formulation for a modification to the Act which has the effect of exempting the provision of the CCSS from the need for a licence under the Act.

4.5 Appendix 1

List of those who responded to the consultation document

- a) Association of Electoral Administrators
- b) Clackmannanshire Council
- c) Communication Workers Union
- d) Consignia plc
- e) The Federation of Small Businesses
- f) I.F.L Pen Friends UK
- g) The National Assembly for Wales
- h) National Federation of SubPostmasters (NFSP)
- i) North Lanarkshire Council
- j) The Office of the First Minister and Deputy First Minister, Stormont
- k) Postwatch
- l) TPG Post Group (TPG)