

Please Quote Our Ref. MCA-LEG/tc/12-1388 (DIS 230)

16th October 2012

Mailbox Services Group
[att. Mr. Ryan Galea]
Mailbox Building
113, Constitution Street,
Mosta MST 9056

Sir,

Re: Decision following complaint alleging provision of postal services by Mailbox Services Group Limited without being authorised to do so

1. Reference is made to the various communications between the Malta Communications Authority [hereafter 'MCA'] and Dr. Claire Cassar on behalf of Mailbox Services Group Limited [hereafter 'MSG'].
2. The MCA has considered the various submissions made by MSG in response to the complaint lodged by MaltaPost Plc [hereafter 'MaltaPost'].
3. The complaint lodged by MaltaPost in substance alleges that MSG is providing postal services without having an authorisation to provide such services as required under the Postal Services Act (Cap. 254 of the Laws of Malta). MaltaPost argues that MSG is delivering addressed postal articles whereby on the envelope/wrapper there is the written or printed address of the addressee to whom the article is to be delivered [photos were supplied in this regard by MaltaPost]. MaltaPost also alleges that MSG is delivering articles in relation to which MSG maintains a list of addressees separately from the articles delivered and in relation to which there is no address written or printed on the said articles.
4. This decision focuses on the first type of postal services which MaltaPost alleges is being provided by MSG.

Submissions by MSG

5. MSG made three submissions in the context of the present complaint dated respectively 30th August 2012, 10th September 2012 and 3rd October 2012. In its initial response dated 30th August 2012 to the complaint lodged by MaltaPost, states that it delivered 'direct mail articles' the amount of which did not exceed 500 articles. MSG argues that the delivery of 500 postal articles does not constitute a 'significant number of addressees' and therefore - according to MSG - the provision of such services falls outside the scope of the regulatory requirements of the Postal Services Act.
6. MSG refers to the MCA regulatory decision entitled 'Regulatory Direction on Specific Aspects of the Universal Postal Service – Overview of Responses to Consultation and Decision Notice' dated 25th March 2011 [hereafter the 'March 2011 Decision'].

MSG argues that Decision 1(1) thereof is not applicable since the direct mail service provided by MSG does not fall within the scope of the universal service. In support of its argument MSG states that [a] the service does not have a specific time frame by when delivery has to be made; [b] it is not intended to be posted in a letter box but specifically required to be hand delivered to specific individuals; and [c] that the addresses were printed on some of the envelopes merely to facilitate delivery.

7. In a subsequent submission dated 10th September 2012 MSG again contend that the services complained about, fall outside the scope of the universal service. MSG argues that the services in question "at best could be subjected to the requirements of applying for a general authorisation." MSG's main focus in this second submission is to argue that the service in question does not fall within the scope of the universal service. In support of this argument MSG refers to article 17(4)(a) of the Postal Services Act [Cap. 254 of the Laws of Malta], which provision lists amongst the minimum facilities of the universal service "the clearance, sorting, transport and distribution of postal articles up to two kilogrammes;". MSG then refers to article 2 of Cap. 254, which describes a "postal article" as an article addressed in the final form in which it is to be carried by a postal operator, MSG arguing that the articles in question are "not addressed in the final form since most of the envelopes in question did not even have an address on them."
8. In substance MSG's reasoning is that the service in question falls within the definition of "direct mail" once the means of delivery is to leave a number of envelopes as indicated by MSG's client in advance of distribution. MSG remarks that this activity may be construed as being "direct mail" or "bulk mail" and therefore Decision number 2 of the March 2011 Decision applies. This Decision according to MSG regulates what constitutes a bulk mail product within the ambit of the Universal Service by referring to what is described as a "priority bulk mail" product which latter product is characterised by D+1 delivery requirement. MSG contends that its service does not constitute such priority bulk mail product and therefore falls outside the scope of the universal service as determined in Decision 2 of the March 2011 Decision. Furthermore MSG states that the incident was a one off activity which does not fall within the ambit of the universal service.
9. The MCA as per its communications dated 19th September 2012 issued a letter of warning to MSG whereby it informed MSG that an administrative fine of €500 may be imposed since MCA considered that MSG had *prima facie* acted in breach of article 7 of the Postal Services Act once MSG had provided postal services without being authorised to do so. MSG in response to this letter of warning contested the imposition of the aforesaid fine, arguing that it [MSG] did not carry out postal services reserved to the universal service provider or falling within the universal service. MSG also argued that if a fine is imposed this should be revised downwards taking cognizance of the extent to which the service was provided.

Decision - the issues to determine

10. The complaint under investigation raises various issues. Paramount among the issues that need to be determined by the MCA is whether MSG did in fact provide postal services without having the requisite authorisation to do so and this in breach of article 7 of the Postal Services Act. If an authorisation was required, then the other issue that needs to be determined is what type of authorisation is required - an individual licence which covers also services provided within the scope of the universal service, or a general authorisation which covers only postal services outside the scope of the universal service.
11. MSG initially argued that it does not require any authorisation be it an individual licence which therefore covers postal services provided within the scope of the universal service, or a general authorisation which relates only to postal services provided outside the scope of the universal service. In its subsequent submission dated 10th September 2012 MSG concedes that "at best" it could be subject to the requirement of applying for a general authorisation. Again in its submissions of the 3rd October 2012, MSG focuses on the point that the services it provided did not constitute postal services reserved to the universal service provider or falling within the universal service. MSG however again did not deny that the services provided may have constituted the provision of postal services requiring at least a general authorisation.
12. MSG does not negate that it is delivered some postal articles with an address printed on them. MSG argues that the amount of articles it delivered in the context of the incident reported by MaltaPost was not significant and therefore no authorisation was or is required. MSG further argues that this incident was a one-off activity.

Provision of postal services without an authorisation

13. In the context of the incident referred to by MSG in its submissions, MCA notes that whether the amount of articles being delivered was not significant or whether the incident was a one off activity, are not at law relevant considerations in determining if one was actually providing postal services requiring an authorisation.
14. The MCA considers that MSG acted in breach of article 7 of the Postal Services Act which article in this regard is very clear – a person can only provide or operate a postal service in Malta if he is authorised as such under the said Act¹. Article 2 of the Act provides that "postal services" are services involving the clearance, sorting, transport and distribution of postal articles. The same article defines a "postal article" as "an article addressed in the final form in which it is to be carried by a postal operator". In addition to articles of correspondence, such articles also include "books, catalogues,

¹ See article 7 of Cap. 254.

newspapers, periodicals and postal parcels however so described including packages containing merchandise with or without commercial value”.

The Act does not make any exemption if the amount of postal articles delivered is not significant or if the activity is a one off activity.

A one-off activity

15. Without prejudice to the above MCA makes reference to MSG’s contention that this was a one off activity. In its letter of warning MSG took up issue with MCA’s comment that MCA finds this hard to accept. The incident in question was brought to the attention of MCA following a complaint by MaltaPost who by chance noticed a person acting on behalf of MSG delivering postal articles providing photographs in support of the complaint. It is in such circumstances that the MCA considers that the contention by MSG that this was a one off activity as unconvincing.
16. The present decision is being taken on the basis that there was at least one occasion whereby such unauthorised services were provided, and not that there may have been other instances where MSG may have similarly provided such services. Moreover with this decision MCA would like to make it unequivocally clear that if it results that MSG is undertaking similar activities which require an authorisation under the Postal Services Act then appropriate regulatory measures will be taken.

Nature of the postal services and type of authorisation required

17. MSG argues that the service it provided is “direct mail” and makes reference to the words “significant number of addressees” in determining what constitutes “direct mail”. The MCA considers that this point is immaterial to the case under investigation, once “direct mail” is in the Postal Services Act **used exclusively in relation to the postal services which are reserved to the universal service provider**. The issue under investigation does not relate to the provision of postal services reserved to the universal service provider, but to the provision of postal services, whether or not falling within the scope of the universal service, which provision requires an authorisation in accordance with the Postal Services Act, which authorisation MSG did and does not have.
18. MCA considers the provision of postal services whether direct mail or otherwise, and irrespective of the number of the postal articles delivered, as requiring an authorisation. On the basis of the information provided by MSG, it results that the postal service in question has characteristics of a postal service that falls within the scope of universal service. In accordance with Decision 1 of the March 2011 Decision, services which fall within the scope of the universal service do not have to cover all the features of the universal service. Hence a service which is not provided with a delivery standard of D+1 but could be deemed as being sufficiently interchangeable with the universal service, would still fall within the scope of the universal service.

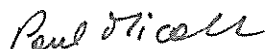
19. In this particular instance MCA considers that MSG provided postal services which are interchangeable with at least one of the types of services listed at law, namely in this case the clearance, sorting, transport and distribution of postal articles up to two kilogrammes [see article 17(4)(a) of Cap. 254]. If it results that MSG is providing such services then it is expected that in the first instance MSG *a priori* has the requisite authorisation – in this instance an individual licence to provide postal services falling within the scope of the universal service.

Imposition of fine and warning if other unauthorised postal services are provided

20. The MCA for the reasons stated above considers that MSG has acted in breach of article 7 of the Postal Services Act and is therefore imposing a fine of five hundred Euros [€500] this in accordance with Part VII of the Malta Communications Authority Act [Cap. 418] and article 76B of the Postal Services Act.

21. If MSG continues to provide a postal service then it is required to have the requisite authorisation necessary for the provision of such a service. Furthermore MCA informs MSG that it will monitor the situation to see if MSG is providing a postal service. If it results that MSG is providing such a service then MCA will undertake further regulatory sanctions including but not limited to daily administrative fines which at law may be imposed up to a maximum of five hundred Euros [€500] for each day of non-compliance.

Yours,



Paul Edgar Micallef
Chief Legal Advisor
Malta Communications Authority

Cc:

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