

Regulating the Postal Sector in a fully Liberalised Market

An ex-ante framework for the regulation of competition

Consultation Document

| | |
|--------------------------|-----------------------------------|
| Document Number: | MCA/C/1143/12 |
| Publication Date: | 1st August 2012 |

Table of Contents

| | Page |
|--|-----------|
| Executive Summary | 5 |
| 1. Introduction | 8 |
| 1.1 Ensuring Fair and Effective Competition | 8 |
| 1.2 Safeguarding the Provision of the Universal Service | 10 |
| 1.3 Document Structure | 11 |
| 2. An Ex-Ante Framework for the Regulation of Competition | 13 |
| 2.1 Market Definition Procedure | 14 |
| 2.2 Market Analysis Procedure - Assessment of Significant Market Power | 17 |
| 2.3 Classifying an Operator as having Significant Market Power | 18 |
| 2.4 Removing a Significant Market Power Classification | 19 |
| 3. Obligations on Operators with Significant Market Power | 20 |
| 3.1 Obligations Applicable to Provision of Services | 20 |
| 3.2 Approval of Tariffs | 21 |
| 3.3 Publication of Tariffs | 23 |
| 3.4 Requirement to Provide Services Consistent With Effective Tariffs | 23 |
| 3.5 Review of Effective Tariffs | 23 |
| 3.6 Separation for Accounting Purposes | 23 |
| 3.7 Transitional Provisions - MaltaPost | 24 |
| 4. Safeguarding the Provision of the Universal Service | 26 |
| 4.1 Universal Service Obligations | 26 |
| 4.2 Designated Universal Service Provider | 27 |
| 4.3 Access to Postal Infrastructure or Services | 29 |
| 5. Proposed Amendments to Regulations | 32 |
| 6. Implementation Plan and Timelines | 35 |
| 7. Requests for Comments | 36 |
| Appendix 01 - Licensed Postal Operators | 37 |
| Appendix 02 - Proposed Amendments to the Regulations | 40 |
| Bibliography | 47 |

Key Definitions

| | |
|---------------------------------------|---|
| Act | Postal Services Act, Cap 254 |
| Bulk letter-post service | A postal service which includes a substantial number of similar letter-post items (such as statements of account), periodicals (items published periodically such as newspapers and magazines), and direct mail (advertisements, catalogues, announcements, etc), which are deposited by a single sender, at the same place and time with a postal operator, to be transported and distributed to the addressees indicated on each of the postal articles. Such services are normally specialized for different types of postal articles and require the sender to subscribe to particular commitments relating to volume, price, preparation or quality of service. The bulk letter-post service also includes a direct mail service, as defined in the Act, which is a particular form of a bulk letter-post service. |
| Customer | Any person who may also be a postal operator, who purchases a postal service from a postal operator. |
| Cross-border mail | Used in relation to mail to (outgoing) or from (incoming) another country as defined in the Act. |
| Directive | Third European Postal Directive 2008/06/EC amending Directive 97/67/EC |
| Designated universal service provider | A licensed postal operator designated by the Minister, in line with the Act, to provide the universal service or parts thereof (i.e. providing a set of universal service obligations) within Malta. |
| Inland mail | Used in relation to a postal article posted in Malta and addressed to any place in Malta as defined in the Act. |
| Insurance | A postal service insuring a postal article in the event of loss, theft or damage up to the value declared by the sender of the postal article. |
| Letter-post service | A postal service for transmission by post of letter-post items (i.e. letters, large envelopes and other small items - such as small packets) weighing up to 2 kilograms per item and adhering to certain restrictions with regard to size. Letter-post is a service designed for the regular exchange of letter communications. Letter refers to a written communication that is individualized for the addressee, such as an invoice, statement of account, postcards or personal greeting. In addition, the letter-post service conveys other letter-post items including books, newspapers, periodicals, magazines, catalogues, and small packets. The letter-post service may convey letter-post items tendered singly or in large quantities. A letter-post service may also include the registration / insurance of letter-post items. In this document a bulk letter-post service is defined separately from a letter-post service (refer to definition for bulk letter-post service). The letter-post service does not include express letters. |
| Licensed postal operator | A postal operator authorised to provide postal services within the scope of the universal service as defined in the Act. |
| Parcel-post service | A postal service that provides for the transmission by post of packages (other than a letter, large envelope or small packet) tendered 'over the counter', either singly or in large quantities. The maximum weight per package for this service is 20 kilograms. Parcels are distinct from letter-post items and transportation freight respectively in consideration to weight and size limits. A parcel-post service may also include the registration / insurance of parcel-post items. The parcel-post service does not include express parcels. |
| Postal article | A postal article (also referred to as a postal item) addressed in the final form in which it is to be carried by the postal operator. In addition to items of correspondence, such items also include books, catalogues, newspapers, periodicals and postal parcels, however so described, |

| | |
|--|--|
| | including packages containing merchandise with or without commercial value. |
| Postal service | A service for the transmission of postal articles from one place to another by post and includes the incidental services involving the clearance, sorting, transport and distribution of postal articles and any other services which relate to any of those services, and is provided in conjunction with any of them. Postal services include the transmission of postal articles of both inland and cross-border mail (incoming and outgoing mail). Transport alone is not considered to be a postal service. |
| Registration | A postal service providing a flat-rate guarantee against risks of loss, theft or damage and supplying the sender, where appropriate upon request, with proof of the handing in of the postal article and, or of its distribution to the addressee. A registered postal item may also be insured. |
| Regulations | Postal Services (General) Regulations [SL251.01 of the Laws of Malta] |
| Services within the scope of the universal service | Postal services as specified in Article 17(4) of the Act, and as defined in the MCA's Decision (2011) - Regulatory Direction on Specific Aspects of the Universal Service. Such postal services are also referred to as services within the universal service area. |
| Universal service | The minimum set of postal services that must be made available to all addresses in Malta (i.e. the availability of a universal service within, to and from Malta) - in terms of access to these services, quality and affordability. The universal service covers both inland and cross-border services. |
| Universal service obligation | The universal service obligation refers to the set of obligations placed on selected postal operators, generally the incumbent designated universal service provider, or on the postal market as a whole. |
| Universal service provider | A postal operator providing the universal service or parts thereof within Malta as may be designated by the Minister (i.e. providing a set of universal service obligations). |
| Users | Any legal or natural person benefitting from postal service provision as a sender or an addressee as defined in the Act. |

Disclaimer

While every reasonable effort is made to ensure that the information provided in this consultation paper is accurate, the Malta Communications Authority (MCA) does not guarantee the currency or accuracy of the information provided. All material relating to information, products and services, is provided 'as is', and without any representation, endorsement, or warranty of any kind, whether express or implied, by the MCA. This consultation paper is not a binding legal document and does not contain legal, commercial, financial, technical, or other advice. The MCA is not bound by it, nor does it necessarily set out the MCA's final or definitive position on matters dealt with in the said consultation paper.

None of the material in this document should be taken to reflect the views of the Ministry for Infrastructure, Transport and Communications (MITC) or to represent official Government policy, unless it is explicitly stated otherwise. This document is without prejudice to the legal position or rights and duties of the MCA to regulate the market generally.

Executive Summary

The Malta Communications Authority's (MCA's) primary objective with regard to the regulation of the postal sector is to safeguard the provision of an efficient, affordable, high quality universal service together with the promotion of fair market conditions conducive to effective competition between postal operators.

The third European Postal Directive 2008/06/EC, adopted on the 20th of February 2008, identified 2010, and for some Member States the end of 2012, as the final step in the gradual opening of the postal markets to competition (referred to as full market opening of the postal sector). Malta was among the eleven Member States which were given the faculty to continue to reserve postal services (i.e. items of correspondence weighing less than fifty grams and costing less than two-and-a-half times the basic postal tariff) to the incumbent designated universal service provider until not later than the end of 2012.

In July 2010, the Postal Services Act and the Postal Services (General) Regulations were amended to reflect the third European Postal Directive. In line with the Second Schedule of the Act, full market opening of the postal sector in Malta will take place on the 1st of January 2013, when the area reserved to MaltaPost Plc, as the incumbent designated universal service provider, will be completely abolished.

Full market opening of the postal sector creates the potential for the development of a more competitive market environment within the universal service area. Users of postal services will stand to benefit from a competitive market environment through more competitive pricing, better service quality and greater choice of services. Competition should also promote further innovation in the postal sector and increase MaltaPost's incentive to continue to improve service quality and efficiencies.

In order for this potential to be realised, however, a suitable regulatory framework needs to be put in place in order to strike a balance between the two primary objectives of ensuring fair and effective competition, on the one hand, and safeguarding the provision of the universal service, on the other.

Ensuring Fair and Effective Competition

Competitive markets are the best placed to provide consumers with a wide choice of postal services at affordable prices and good quality. In recognising the effectiveness of competitive market forces in promoting consumer interests, appropriate measures are required to ensure and maintain fair and effective competition in the postal sector.

In order to develop and maintain fair and effective competition in the postal sector, a distinction needs to be made between postal services offered under conditions of effective competition and those offered under conditions of market power. The intention is to put in place a market review procedure modelled on the concept of significant market power in the electronic communications sector, but modified to reflect the

intrinsic peculiarities of the postal sector, along with the operating environment and conditions unique to the postal sector in Malta.

A market review procedure would enable the MCA to define the different postal services markets within the universal service area (i.e. by dividing the postal services market into segments) and assess competition within these markets. In the absence of effective competition, the MCA will classify one or more licensed postal operators as having significant market power.

To the extent that a postal operator has significant market power, in one or more postal services markets, specific *ex-ante* regulatory intervention is necessary to prevent anti-competitive practices and to safeguard the interests of users. *Ex-ante* regulatory intervention is necessary to ensure that postal operators having significant market power provide postal services on terms and conditions, and at cost-oriented tariffs that are non-discriminatory and transparent.

The introduction of a market review procedure would benefit all market players by ensuring a level playing field for all postal operators providing postal services within the universal service area. In addition, the market review procedure would allow postal operators, including MaltaPost, the necessary flexibility to operate in postal services markets that are effectively competitive.

Safeguarding the provision of the universal service

With full market opening of the postal sector users would still need to have guaranteed access to specific universal services at a specified quality and at affordable prices. The universal service refers to the delivery and collection, on every working day, of a minimum set of postal services to any person who requests such services.

In a fully liberalised and competitive market environment, the MCA intends to continue to ensure the provision of the universal service via a combination of:

- reliance on market forces where it is feasible and appropriate to do so; and
- the continued designation of MaltaPost as the universal service provider (and/or the designation of other universal service providers if necessary) to provide the universal service in circumstances in which the needs of users are not satisfactorily met by the market.

The universal services which a designated universal service provider is obliged to provide, and which are not effectively competitive, will be subject to specific *ex-ante* regulatory intervention applicable to a postal operator having significant market power. Where the universal services are provided under conditions of effective competition, the MCA will rely upon competitive market forces to ensure that tariffs are cost-oriented, non-discriminatory, efficient and otherwise compliant with the tariff principles specified in the Postal Services Act.

The MCA will retain its prerogative to continue monitoring the tariffs of the services forming part of the universal service provided by a designated USP, in order to ensure

that tariffs are in line with the tariff principles specified in the Postal Services Act – for example with regard to tariff affordability and, where necessary, uniform pricing.

When a particular universal service can be ensured by relying solely on market forces, the obligation to provide such a postal service by a designated universal service provider may be withdrawn, in line with the Postal Services Act.

Proposed Amendments to Regulations

The Postal Services Act enables the Minister responsible for postal matters to introduce provisions to ensure fair and effective competition in all practices, operations and activities relating to postal services. To effect the changes to the proposed regulatory framework set out in this paper, the MCA is proposing corresponding amendments to the Postal Services (General) Regulations.

Consultation Process

The MCA is seeking views from the industry and members of the public on the proposed framework for the regulation of competition outlined in this consultation paper. The MCA is also seeking the views on the corresponding proposed amendments to the Postal Services (General) Regulations.

The MCA will, taking into consideration the responses received to this consultation, submit the proposed amendments to the Postal Services (General) Regulations to the responsible Minister. Following the adoption of the proposed amendments to the Regulations, the MCA will issue its decision on the revised regulatory framework.

The consultation period will run from the **1st of August 2012** till the **18th of September 2012**.

1. Introduction

The third European Postal Directive 2008/06/EC amending Directive 97/67/EC, adopted on the 20th February 2008 (hereinafter referred to as “the Directive”), identified 2010, and for some Member States the end of 2012, as the final step in the gradual opening of the postal services markets to competition - referred to as full market opening of the postal sector. Malta was among the eleven Member States which were given the faculty to continue to reserve postal services (i.e. items of correspondence weighing less than fifty grams and costing less than two-and-a-half times the basic postal tariff) to the incumbent designated universal service provider (USP) until not later than the end of 2012.

In July 2010, the Postal Services Act and the Postal Services (General) Regulations (hereinafter referred to as “the Act” and “the Regulations” respectively) were amended to reflect the Directive. In line with the Second Schedule of the Act, full market opening of the postal sector in Malta will take place on the 1st of January 2013, when the area reserved to MaltaPost Plc (hereinafter referred to as MaltaPost) will be completely abolished.¹

As a result of full market opening of the postal sector, the MCA believes that users of postal services will stand to benefit from a competitive market environment through more competitive pricing, better service quality and greater choice of services. Competition should also promote further innovation in the local postal sector. In addition, it will increase MaltaPost’s incentives to further improve its service quality and efficiencies, even though MaltaPost is currently providing a high level of service quality and users are generally satisfied with its services.

Full market opening of the postal sector should therefore result in a net benefit to users. In order for this potential to be realised, however, a suitable regulatory framework needs to be put in place such as to strike a balance between the two primary objectives of ensuring fair and effective competition, on the one hand, and safeguarding the provision of the universal service, on the other.

1.1 Ensuring Fair and Effective Competition

In order to ensure the lasting development of fair and effective competition, in a fully liberalised market environment, a distinction needs to be made between postal services offered under conditions of effective competition and those offered under conditions of market power.

¹ The complete removal of the ‘reserved area’ for MaltaPost, as the incumbent designated USP, will allow new entrants to offer end-to-end services for all postal services, including letter mail, bulk mail, direct mail, newspapers, periodicals and other mail items. As a rule, such postal services would be in direct competition with those services provided by MaltaPost.

When a sector is moving towards full market opening, bringing about fair and effective competition, necessitates the adoption of an appropriate *ex-ante* regulatory regime. This is required to ensure that an operator cannot use its market power either to restrict or distort the onset of competition.

In such circumstances as described above, an operator that has market power may reduce prices in potentially competitive areas of business, and raise prices in those areas less potentially competitive. This reduces the effectiveness of competition and denies users the benefits that would otherwise flow from full market opening of the postal sector to competition. In these situations, certain protective measures, such as *ex-ante* tariff control, may be necessary to, amongst others, stimulate competition and protect customers from unreasonably high prices.

Experience from comparable sectors provides a direction on how regulation of the postal sector should evolve. More specifically, the electronic communications regulatory framework gives the power to the MCA, through the market review procedure, to gauge the degree of competitiveness of a specific electronic communications market, before deciding on the imposition of appropriate *ex-ante* regulation.

In order to ensure fair and effective competition in the postal sector, the MCA is proposing to implement an *ex-ante* regulatory framework by drawing on 'best practice' of other jurisdictions and building on the experience that the MCA has gained in facilitating competition in the electronic communications sector. At the same time the postal regulatory framework must reflect the market environment and operational conditions unique to the postal sector in Malta.

A market review procedure for the postal sector would enable the MCA to define the different postal services markets within the universal service area, assess competition within these markets, and in the absence of effective competition classify one or more licensed postal operators as having significant market power (SMP).

An operator is said to have SMP if it is in a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers (i.e. the ability to unilaterally restrict output, raise prices, and reduce quality or otherwise act, to a significant extent, independently of competitive market forces). An undertaking with SMP might also have the ability and incentive to harm the process of competition - for example, by weakening existing competitors and raising entry barriers.

To the extent that a postal operator has SMP, in one or more postal services markets, specific *ex-ante* regulatory intervention is necessary to prevent anti-competitive practices and to safeguard the interests of users.

Regulation of the postal sector is already largely asymmetrical, in that specific *ex-ante* regulation is only imposed on the incumbent designated USP, MaltaPost. *Ex-ante* regulation is required due to MaltaPost's current dominant position within the universal service area, coupled with the need to safeguard the provision of the universal service. This includes, amongst others, the need for MaltaPost to obtain the MCA's approval

before increasing its tariffs in order to safeguard the interests of consumers and to ensure conformance with the universal service tariff principles specified in the Act.²

The paradigm shift in the regulation of the postal sector will imply that certain *ex-ante* regulatory obligations currently imposed only on MaltaPost, such as *ex-ante* tariff control, will be imposed on a postal operator having SMP in a given postal services market.

The introduction of a market review procedure for the postal sector would ensure a level playing field for all postal operators providing services within the scope of the universal service.³ New market entrants would be protected from any anti-competitive behaviour in areas where the potential for barriers to entry is high.

On the other hand, the market review procedure would allow the incumbent designated USP, MaltaPost, the necessary flexibility to operate in postal services markets that are effectively competitive, via the rolling back of *ex-ante* regulation in those cases where MaltaPost is no longer classified as having SMP.

1.2 Safeguarding the Provision of the Universal Service

With full market opening of the postal sector, users would still need to have guaranteed access to specific universal services at a specified quality⁴ and at affordable prices.⁵ The universal service refers to the delivery and collection, on every working day,⁶ of a minimum set of postal services to any person who requests such services.⁷

The universal service is currently ensured by MaltaPost as the only postal operator designated to provide a set of universal service obligations. The Directive recognises that this may not be the only approach in a competitive market environment. In a competitive market environment the universal service may continue to be ensured by one or a combination of the following:⁸

² Price control is designed to protect users, when there is no, or very limited, competition or where the competition in the market has not developed sufficiently to protect the interests of users, particularly where there is risk of excessive pricing. MaltaPost's price control has protected users by setting prices and service quality standards for the universal services provided by MaltaPost. It also seeks to ensure that MaltaPost has sufficient revenue to finance the universal service.

³ Services outside the scope of the universal service (e.g. express / courier mail services) have been operating in a liberalised and competitive environment for a good number of years and the MCA considers that there is no reason to impose new regulatory obligations in this market.

⁴ In particular QoS measures relate to transit times and the regularity and reliability of the universal services (for both inland and cross-border mail).

⁵ This includes the availability of a universal service within, to and from Malta at an affordable price for the benefit of all postal service users. In addition, prices for universal services must be transparent, non-discriminatory, and cost-oriented and give incentives for an efficient service.

⁶ The Act defines a 'working day' as a day which is not a Sunday or a public holiday.

⁷ Article 3 of the Directive, as transposed in Article 17 of the Act, sets out a general description of the universal service that MaltaPost, as the only currently designated USP, is required to provide. Also refer to MCA (2011) Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice. **Appendix 01** of this decision sets out the postal services that make up the universal service in Malta.

⁸ Recital 23 of the Directive outlines how the universal service may continue to be ensured in a fully liberalised postal market environment.

- reliance on market forces;⁹
- designation of one or more postal operators required to provide different elements of the universal service, or to cover different parts of the territory;¹⁰ and
- public procurement of services.¹¹

In a fully liberalised and competitive market environment, the MCA intends to continue to safeguard the provision of the universal service via a combination of:

- reliance on market forces, where it is feasible and appropriate to do so; and
- the continued designation of MaltaPost (and/or the designation of other universal service providers as may be necessary)¹² to provide the universal service in circumstances where the needs of users are not satisfactorily met by the market.

When a particular universal service can be ensured by relying solely on market forces the obligation to provide such a service by a designated USP may be withdrawn in line with the Act and the Regulations.

1.3 Document Structure

The remainder of this consultation document comprises of the following six sections:

- **Section 2** outlines the proposed *ex-ante* framework for the regulation of competition. This section contains provisions for defining the different postal services markets within the universal service area and classifying postal operators, whose conduct is not constrained adequately by market forces, as having SMP in those markets. This section also sets out the process through which a postal operator having SMP in a postal services market might be relieved of an SMP classification, following a finding of effective competition in that market.
- **Section 3** depicts the specific *ex-ante* regulatory obligations applicable to a licensed postal operator(s) having SMP in a postal services market. These obligations include the requirement to file tariffs with the MCA for approval, and to publish the terms and conditions of the postal service offered. This section also

⁹ The provision of universal services via market forces means that it is up to the postal operators to decide what services to provide, while the regulator would intervene if there are any resulting gaps in service provision.

¹⁰ In line with Article 17 of the Act, the Minister may, after consultation with the MCA, amend or suspend any designation of a USP, and, where applicable and after consultation with the Authority, designate another postal operator in respect of the service affected by any such withdrawal, amendment or suspension.

¹¹ In line with Article 17(7) of the Act, the Minister may ensure the provision of universal services by procuring such services.

¹² The Minister may, after consultation with the MCA, determine the different universal service providers, designated in line with Article 17 of the Act, to provide different parts of the universal service and, or cover different parts of the national territory. In line with the Directive, in cases when more than one undertaking has been designated as a USP, there must be no overlap in the universal service obligations.

identifies the transitional provisions with regard to the filing of tariffs by MaltaPost with the MCA.

- **Section 4** outlines how the universal service will continue to be safeguarded via a combination of market forces and the continued designation of a USP, or USPs, to provide the universal service obligations in circumstances in which the needs of users are not satisfactorily met by the market.
- **Section 5** delineates the proposed amendments to the Regulations for the MCA to be in a position to ensure fair and effective competition, whilst safeguarding the provision of the universal service.
- **Section 6** outlines the key work-streams and implementation timelines for the MCA to be in a position to put in place the revised *ex-ante* framework for the regulation of competition.
- **Section 7** outlines the process for the submission of comments on the revised regulatory framework and the corresponding proposed amendments to the Regulations.

The consultation document also includes the following two appendices:

- **Appendix 01** outlines the main obligations on postal operators licensed to provide postal services within the scope of the universal service coupled with the specific obligations related to a designated USP. This appendix also outlines the specific *ex-ante* regulatory obligations applicable to licensed postal operators classified as having SMP in one or more postal services markets.
- **Appendix 02** depicts the proposed amendments to the Regulations.

2. An Ex-Ante Framework for the Regulation of Competition

An *ex-ante* regulatory framework is intended to ensure and maintain fair and effective competition in the provision of postal services falling within the scope of the universal service.¹³ Such a framework sets forth the rules to facilitate entry of new postal operators and to prevent abuse by postal operators not yet subject to constraints posed by competitive market forces.

The adoption of a market review procedure for the postal sector would allow the MCA to identify the different postal services markets within the universal service area (i.e. by dividing the postal services market into segments) that are susceptible to *ex-ante* regulation. In addition, the MCA will be able to conduct an analysis of the effective competitiveness of these markets. Where the MCA concludes that a postal services market is not effectively competitive it will classify one or more postal operators as enjoying a position of SMP. A postal operator shall be deemed to have SMP if either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately users.

A postal operator classified as having SMP in a postal services market will be required to comply with specific *ex-ante* regulatory obligations (refer to **Section 3**) to ensure fair and effective competition and to safeguard the interests of consumers. Where the MCA concludes that a market is effectively competitive, the MCA will not impose any of the specific regulatory obligations applicable to a postal operator having SMP, or remove previously imposed obligations.

The market review procedure for the postal sector will follow four distinct stages:

1. Market definition procedure
2. Market analysis procedure - assessing SMP
3. Classifying a postal operator as having SMP / Removing an SMP classification
4. Identifying and applying regulatory obligations / remedies

The first three stages are addressed in the remainder of this section. Stage 4, on the other hand, is dealt with separately in **Section 3** below, given that it constitutes a distinct – and rather extensive – exercise and therefore merits further elaboration.

¹³ Refer to MCA (2011) Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice. **Decision 01** of this decision sets out a definition of postal services that fall within the scope of the universal service. The provision of postal services that fall within the scope of the universal service requires a licence under article 8 and article 9 of the Act.

2.1 Market Definition Procedure

The market definition procedure is used to determine the relevant postal services (also interchangeably referred to as postal products) within a geographical region that share one or more similar characteristics (i.e. directly competing products). Such products are said to fall within the same relevant postal services market in which a postal operator participates.

2.1.1 Postal services markets

Postal services include services or facilities provided to customers (retail postal services¹⁴) and access to facilities for postal operators to provide services to customers (wholesale postal services¹⁵).

A retail postal service is one that is provided to a final customer. For example, if a customer sends a stamped letter to be received by the recipient the following day, the processing and delivery of the letter by the postal operator is considered to be a retail postal service and may constitute a market in its own right. A postal services market could, however, be broader than a single postal service and may include a number of postal services, possibly provided by competing operators. Such services would be considered as substitutes to each other and therefore falling within the same relevant postal services market. To provide a retail postal service a number of inputs are needed. This set of inputs can be thought of as a supply chain from collection of the postal article to its delivery to the recipient (i.e. the clearance, sorting, transport and distribution of postal articles).

Wholesale postal services relate to the inputs provided between collection and distribution that are sold as an intermediary service to a postal operator, for the latter to, in turn, provide a retail postal service. In terms of the postal sector, wholesale postal services have traditionally been used to describe access to the incumbent designated USP's downstream network (i.e. the downstream access to sorting and delivery parts of the postal network).

In line with international standards, postal services falling within the scope of the universal service have been segmented horizontally into two broad postal services markets¹⁶:

- **Letter-post items** - postal articles, with a weight of a maximum of two kilograms per item and adhering to certain restrictions with regard to size.¹⁷

¹⁴ Retail refers to a postal service serving a final customer.

¹⁵ Wholesale refers to postal activities that are sold as intermediary products to provide a retail service.

¹⁶ Another market segment which falls outside the scope of the universal service relates to Express and Courier services (referred to as the competitive segment of the postal market and subject to less regulation). Express and courier services refer to time-definite shipments (i.e. providing certainty and guarantee as to the exact day or time of delivery specified), including documents, parcels and merchandise goods.

¹⁷ Letter-post items are normally categorised into three distinct formats: Letter/Postcard, Large Envelope and Packet. Letters, large envelopes and packets are classified based on weight and shape of the postal article, such as:

- **Parcel-post items** - postal articles that do not adhere to the size restrictions for letter-post items. Parcels are distinct from letter-post items (especially small-packets) and transportation freight respectively in consideration to size and weight limits.¹⁸

Additional market segmentation can be made accordingly on the basis of factors such as types of sender, delivery class, quantities of mail submitted and letter formats. Postal services markets can also be segmented vertically (across operational pipeline of activities), depending on the existence of economic bottlenecks within the postal value chain.

2.1.2 Defining relevant product / service markets

A relevant market has both a product and geographic dimension. The product dimension includes all products that are regarded as being sufficiently interchangeable or substitutable. The geographic dimension consists of the area where operators are involved in the supply and demand of the product and where the competitive conditions are reasonably similar, and are different from neighbouring areas.¹⁹

The existence of any demand and supply-side substitution may be determined through the 'hypothetical monopolist test'.²⁰ The 'hypothetical monopolist test' is used as a framework for market definition purposes in both the product and geographical dimensions. The test seeks to define a market by establishing the closest substitute to the product being considered. These substitute products are the most immediate competitive constraints on the behaviour of the undertaking supplying the product. This test evaluates what will happen if there was a small but significant, lasting increase in the price of a given product, assuming that the prices of all other products remain constant.

The extent to which the provision of a product in a specific area constitutes a relevant postal services market depends on the existence of competitive constraints on the price-setting behaviour of the postal operator(s) concerned. The main competitive constraints

-
- Letter/Postcard - Minimum dimensions: 90mm × 140mm × .18mm, with a tolerance of 2mm. Maximum dimensions: 162mm × 235mm × 5mm. Maximum weight 100grams.
 - Large envelope - Minimum dimensions: 90mm × 140mm × .18mm, with a tolerance of 2mm. Maximum dimensions: 300 mm × 400 mm × 25mm. Maximum weight 500g.
 - Packets - Minimum dimensions: 70mm × 100mm × 25 mm (In roll form: length and twice diameter: 170mm, greatest dimension not less than 100mm). Maximum dimensions: length, width and depth combined: 900 mm, greatest dimension not exceeding 600mm, with a tolerance of 2mm (In roll form: length and twice diameter: 1040mm, greatest dimension not exceeding 900mm) with a tolerance of 2mm. Maximum weight 2kg.

¹⁸ Parcels - Maximum dimensions: Length 1.5 metres, Length + Girth 3 metres [Girth = 2 x (Depth + Width)]. Maximum weight: 20 kilograms.

¹⁹ A relevant market therefore comprises a product or group of products and the geographic area in which these products are produced and/or traded. Therefore, a relevant market has two components: the product market and the geographic market.

²⁰ Also known as the 'SSNIP' (small but non transitory increase in price) test. This is a test used in competition analysis to define a market in terms of size and scope. A market is defined as the smallest product or group of products (and geographical area) in which a hypothetical monopolist can profitably sustain a small but significant non transitory increase in price.

that the MCA will take into consideration in assessing the price-setting behaviour on the market are: (i) demand-side; and (ii) supply-side substitution.²¹

Demand-side substitution

Demand side substitution takes place when consumers switch from one product to another in response to a change in the relative prices of these products. If consumers are in a position to switch to available substitute products or to begin sourcing their requirements from suppliers located in other areas, then it is unlikely that price increases will be profitable. Therefore, it is necessary to progressively include in the relevant market the products to which consumers would most likely switch in response to a relative price increase.

The relevant product market comprises of all those products that are sufficiently interchangeable or substitutable. Products which are only to a small degree interchangeable with each other would not form part of the same market.

Supply-side substitution

Supply side substitution is used to determine the likelihood that undertakings not currently active in the relevant market may decide to enter the market within a reasonable timeframe. This substitutability test will determine whether other potential competitors should be taken into consideration within that market for the scope of the analysis. The relevant product market in terms of the actual and potential competitors would be determined by the terms of the conditions of competition and/or the structure of supply and demand on the market in question.

Geographic scope of the market

Following the identification of the products falling within the same relevant product market, the geographic areas in which these products are being provided on equivalent conditions are determined before proceeding to the market analysis procedure.²²

2.1.3 Relevant postal services markets

The MCA has identified four relevant postal services markets, which fall within the universal service area and are national in scope,²³ on which specific ex-ante regulation may be warranted (refer to **Table 1** below).²⁴ The relevant postal services markets

²¹ Demand side substitutability is used to measure the extent to which consumers are prepared to substitute other services for the service in question. Supply side substitutability indicates whether suppliers other than those offering the service would switch in the immediate to short term to the provision of these services without incurring significant additional costs.

²² The same factors used in delineating relevant product markets are used to define the relevant geographic market.

²³ The MCA believes that the relevant postal service markets provided in Malta would be national in scope (i.e. cover the entire national territory). This, however, does not exclude the possibility of defining postal services markets which may not be national in scope. The definition of the geographical scope of a relevant market is generally determined with reference to the area covered by a network and to the existence of legal and other regulatory instruments.

²⁴ MaltaPost, as the incumbent designated USP, is currently subject to ex-ante tariff regulation in all the relevant postal markets identified in **Table 1** – Refer to MCA (2011), Regulatory Direction on Specific Aspects

identified in **Table 1** below are without prejudice to any other relevant postal services markets, submarkets, or market segments, that the MCA may define in line with the market definition procedure described above.

| Table 1: Relevant Postal Services Markets | |
|--|--|
| Postal Services Market 1: | Letter-post services market |
| Postal Services Market 2: | Bulk letter-post services market |
| Postal Services Market 3: | Registered letter-post services market |
| Postal Services Market 4: | Parcel-post services market |

The fact that the MCA has defined a relevant postal services market does not mean that the market will be subject to the imposition of specific *ex-ante* regulatory obligations. Specific *ex-ante* regulatory obligations will not be warranted if the results of a forward-looking market analysis procedure (refer to **Section 2.2**) show that the market is effectively competitive.

2.2 Market Analysis Procedure - Assessment of Significant Market Power

In determining whether a postal operator has the ability to exercise SMP in a relevant postal services market, the MCA will carry out a forward-looking market analysis by:

- determining the market participants and the market shares;
- considering other factors that would increase or decrease the ability of the postal operator to act anti-competitively; and by
- considering evidence of actual market performance.²⁵

Market shares, although not in isolation, are a clear indication of the extent of SMP that a particular postal operator enjoys in the market. High market shares are not in themselves decisive as to whether a postal operator enjoys SMP in a relevant postal services market. A postal operator with a market share of over 40% would normally be considered to have SMP in a postal services market, although the MCA may have concerns about dominance even with lower market shares.

According to established European case-law, very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of

of the Universal Postal Service – Decision Notice (**Decision 3** - Regulation of the USP's tariffs with respect to postal services within the scope of the universal service).

²⁵ The MCA will use qualitative and quantitative information from postal operators and users in order to carry out a detailed analysis of the relevant postal services markets. The MCA has already gathered a wide array of information and data which has been maintained for a number of years (e.g. quarterly market information from postal operators, market research carried out by the MCA, information available through operators' websites and other media sources, information available under specific licence conditions and information from various international and European studies). The MCA may require additional information that would be essential for the detailed analysis of relevant postal services markets (e.g. through industry and customer questionnaires, workshops, meetings and telephone conferences).

SMP. An operator will be presumed to have SMP, if its market share has remained stable over time. The fact that an operator is losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of SMP. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in a relevant market.

The MCA may also consider other factors that would increase or decrease the ability of a postal operator to act anti-competitively before coming to a conclusion as to the existence of SMP. These may include, amongst others, the overall size of the undertaking, control of infrastructure that is not easily duplicated, economies of scale and scope, a highly developed distribution and sales network and the absence of potential competition.

A postal operator having SMP on a specific postal services market may also be deemed to have SMP on a closely related postal services market, where the links between the two postal services markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

2.3 Classifying an Operator as having Significant Market Power

MaltaPost's long standing position as the incumbent designated USP has ensured that MaltaPost enjoys a dominant position within the universal service area.²⁶ As a result MaltaPost is currently subject to specific *ex-ante* regulation, such as *ex-ante* tariff control, for all the postal services it provides within the scope of the universal service.²⁷

In order to ensure a smooth transition to a fully liberalised and competitive market environment, upon adoption of this *ex-ante* framework for the regulation of competition, the MCA will classify MaltaPost as having SMP in all the postal services markets identified in **Table 1** above. MaltaPost will therefore be subject to specific regulatory obligations applicable to postal operators having SMP at the outset (refer to **Section 3**). Such a classification will apply until the MCA reclassifies MaltaPost as not having SMP, pursuant to the process outlined in **Section 2.4**, in any relevant postal services market in which the MCA has previously classified it as having SMP.

At any time, the MCA may classify a licensed postal operator as having SMP in any relevant postal services market, if it determines, based on the factors specified in **Section 2.2**, that the postal operator has SMP. The MCA will require a postal operator classified as having SMP to comply with specific regulatory obligations in that market.

²⁶ This position has been consolidated by the area currently reserved to MaltaPost as the incumbent designated USP.

²⁷ Refer to MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice. In line with this Decision, MaltaPost may seek to remove postal services from price control to the extent that it believes that competition has developed in the provision of those postal services. However it is for the MCA to determine whether an appropriate degree of competition has been established.

Prior to classifying a postal operator as having SMP in a relevant postal services market, the MCA will consult with all the stakeholders involved.²⁸ After taking into consideration the opinions of all the stakeholders, the MCA will issue its decision on the outcome of the market analysis and the related *ex-ante* regulatory obligations.

The MCA will publish its decision on a postal operator having SMP in a relevant postal services market on its website. In doing so, the MCA will indicate the basis on which it has declared a postal operator as having SMP in a relevant postal services market or markets and the accompanying related specific regulatory obligations.

2.4 Removing a Significant Market Power Classification

In any case in which the MCA has classified a postal operator as having SMP in a relevant postal services market, pursuant to **Section 2.3**, the MCA will remove such a classification if it determines, based on the factors specified in **Section 2.2**, that the postal operator no longer has SMP in that market.

The MCA may consider removing the classification of a postal operator as having SMP in a relevant postal services market either:

- on its own initiative, following a market analysis procedure carried out every three to four years (in line with the process outline in **Section 2.2**), or at any other time as market developments may render necessary; or
- upon the request of a postal operator that is classified as having SMP.

A request for a reclassification by a postal operator would need to be accompanied by verifiable data to support its request. The MCA will provide an opportunity for public comments before issuing a decision granting or denying the request. In each case, the MCA will seek to issue its final decision within a reasonable timeframe from the close of public consultation.

Where the MCA determines that the classification of a postal operator having SMP in a specific postal services market should be removed, the MCA will withdraw the related regulatory obligations (refer to **Section 3**) placed on a postal operator in that market. An appropriate notice period will be given to parties affected by such a withdrawal of regulatory obligations applicable to an SMP postal operator.

²⁸ The public consultation process will be carried out over a minimum period of four weeks through which any interested parties may forward comments on the classification of a postal operator(s) having SMP in a relevant postal services market(s).

3. Obligations on Operators with Significant Market Power

The specific *ex-ante* regulatory obligations (also referred to as *ex-ante* regulatory remedies) are imposed on a postal operator providing services within the scope of the universal service, as a result of it having been assessed as enjoying a position of SMP in a relevant postal services market(s). They are intended to ensure fair and effective competition and to safeguard the interests of users.

To the extent that postal operators are not subject to competitive market forces in any relevant postal services market, *ex-ante* regulatory intervention is necessary to ensure that such postal services are provided on terms and conditions, and at cost-oriented rates that are non-discriminatory and transparent. In contrast, when the MCA concludes that postal operators are subject to competitive market forces, the specific *ex-ante* regulatory obligations imposed on an SMP postal operator will need to be withdrawn subject to a reasonable period of notice.

This section sets out the requirements with which a postal operator is required to comply in any postal services market where it is classified by the MCA as having SMP. This section also establishes a tariff approval, review and publication framework designed to ensure compliance.

3.1 Obligations Applicable to Provision of Services

A postal operator classified as having SMP in a relevant postal services market is required to provide such services in that market to customers on terms and conditions, and at cost-oriented tariffs that are non-discriminatory.

3.1.1 Provision of services at cost-oriented rates

A postal operator classified as having SMP in a relevant postal services market is required to provide such services in that market to customers at cost-oriented rates.

Cost-oriented rates ensure that a postal operator does not charge excessive prices to customers, nor does it attempt to restrict market entry by charging unreasonably low prices or unfairly squeezing the margins of competitors or potential competitors to the detriment of competition.

3.1.2 Provision of services on a non-discriminatory basis

A postal operator classified as having SMP in a relevant postal services market is required to:

- provide such services in that market to customers at prices, terms and conditions that are not discriminatory; and

- not discriminate in favour of itself, or of its subsidiaries or partners, in the provision of such services in that market.

The requirement to provide services on a non-discriminatory basis requires that the differences in prices, terms and conditions for comparable services must be based on objective differences, such as, but not limited to, variations in the cost of the service provided, variations in the quantity or quality of service provided or variations in the duration of the service agreement period.

The provision of services at prices, terms and conditions which are non-discriminatory would ensure that a postal operator does not discriminate in favour of particular customers in such manner as to have a detrimental effect on competition.

3.1.3 Provision of services on an unbundled basis

A postal operator classified as having SMP in a relevant postal services market is required to provide such services in that market on an unbundled basis. This means that the postal operator must not require that, as a condition for purchasing a particular postal service, a customer must also purchase any other postal service or non-postal service. However the postal operator may offer customers the option of purchasing a package that contains multiple postal services and non-postal services or products.

Though bundling is intended to provide customers with better products or offerings in more cost effective ways, an undertaking with SMP in one product market (or more) of a bundle, can potentially harm consumers by foreclosing the market for the other products that are part of the bundle. To mitigate the effects of unreasonable bundling, a postal operator found to enjoy SMP in a relevant postal services market is required to provide such services in that market also on a standalone basis.

3.2 Approval of Tariffs

In order for the MCA to be in a position to ensure that tariffs are in line with the above-mentioned principles, a postal operator classified as having SMP in a relevant postal services market is required to:

- file a tariff with the MCA and obtain the MCA's approval prior to offering, or modifying the terms and conditions on which it offers, any postal service that it provides in that market, including services designed for specific customers; and
- obtain the MCA's approval prior to withdrawing the postal service that it provides pursuant to an effective tariff.

3.2.1 Information requirements

In order for the MCA to be in a position to assess whether a proposed tariff is in line with the above-mentioned principles, any proposed tariff submitted to the MCA for approval would need to:

- clearly describe the postal service to be offered in the relevant postal services market;
- contain a clear statement and the prices, terms and conditions (including quality of service and any eligibility requirements) on which the SMP postal operator offers to provide the postal service;
- list any discounts or special considerations that the SMP postal operator will offer and the requirements that must be satisfied (such as minimum volume or term requirements) to obtain these discounts;
- list the minimum period of time during which the postal service will be available and the minimum period of time, if any, during which the SMP postal operator will not increase the filed rates;
- be self-contained and include charges for any good or service not generally subject to tariff regulation when offered as part of a package; and
- be accompanied by a memorandum that describes the proposed offering or modification and provides sufficient information to demonstrate that the proposed offering or modification satisfies the relevant tariff review criteria specified below (refer to **Section 3.2.2**).

3.2.2 Criteria applicable to tariff review and approval

In assessing whether a proposed tariff is in line with the above-mentioned principles, the MCA will apply the following criteria to assess whether the prices are either excessive or inadequate.

- To assess whether the prices are excessive the MCA will take into consideration cost accounting data and related regulatory accounts provided by the postal operator. The MCA may also consider how the prices compare with those in a “basket” of benchmark jurisdictions determined by the MCA.
- To determine whether the prices are inadequate, the MCA will assess whether the prices are cost-oriented and give incentives for an efficient service provision by using cost accounting methods. The MCA may have regard to the prices at which postal services are offered by other postal operators that provide a comparable service.
- The MCA will also seek to determine whether the prices are non-discriminatory by comparing the prices to those that the postal operator offers in other tariffs for comparable services.
- In cases where the MCA determines that a service has a widespread public impact, the MCA may also consider other relevant factors.

3.3 Publication of Tariffs

An SMP postal operator is required to disclose, by publishing on its website, the effective tariff not later than the date on which it begins to provide the postal service described in the tariff.

Where an SMP postal operator has obtained the MCA's approval to modify the tariff for an existing postal service, it must make the required publication no later than the date on which the modification becomes effective. The information must, at a minimum, include a service description, prices (including any discount structures), service quality and availability, and eligibility requirements.

3.4 Requirement to Provide Services Consistent With Effective Tariffs

A postal operator classified as having SMP in a relevant postal services market is required to provide the postal services in that market at the prices, terms and conditions specified in the applicable effective tariffs. In any case in which the MCA allows a proposed tariff to go into effect, and a postal operator having SMP subsequently enters into an agreement on terms that differ from those in its effective tariff, the MCA may:

- take appropriate enforcement action against the SMP operator;
- direct the SMP operator to amend its agreement to comply with the prices, terms and conditions in its effective tariff; and/or
- direct the SMP operator to file a new tariff embodying the terms of the agreement.

In any case in which a postal operator having SMP enters into an agreement based on the terms of an effective tariff, and the MCA subsequently allows (or directs) the SMP operator to modify the terms of such tariff, the SMP postal operator must amend the agreement to be consistent with the modified tariff.

3.5 Review of Effective Tariffs

The MCA will review the effective tariff periodically to determine whether the prices, terms and conditions remain cost-oriented and non-discriminatory, and may direct a postal operator having SMP in a relevant postal services market to make appropriate modifications.

In addition, any party that believes that the prices, terms and conditions on which a postal operator having SMP is providing postal services pursuant to an effective tariff are unjust, unreasonable or discriminatory may petition the MCA to review those provisions. The petitioner must provide the basis for its contention.

3.6 Separation for Accounting Purposes

A postal operator classified as having SMP in a relevant postal services market is required to keep separate accounts within its accounting system. This obligation is

specifically required, amongst others, to support the obligation of non-discrimination of tariffs.

A postal operator classified as having SMP is required to operate and maintain a cost accounting system including related regulatory accounts that are:

- based on generally accepted accounting practices;
- suitable for ensuring compliance; and
- capable of verification by the MCA.

The MCA may specify the format and accounting methodology to be used by a postal operator which is found to have SMP.

Through the accounting separation obligation the MCA will be in a position to assess whether an SMP postal operator is adopting any uncompetitive pricing policies that could result in price dumping or margin squeeze which will ultimately harm competition by driving out competitors.

3.7 Transitional Provisions - MaltaPost

Any postal service offered by MaltaPost, which falls within the scope of the universal service, is currently subject to *ex-ante* tariff regulatory provisions until competition has developed sufficiently in the provision of these services.²⁹

As mentioned in **Section 2.3** above, upon adoption of the proposed *ex-ante* framework for the regulation of competition, the MCA will classify MaltaPost as having SMP in all the relevant postal services markets identified in **Table 1** above. All existing tariffs subject to *ex-ante* tariff control before the date this regulatory framework comes into effect, will remain in effect until such time as the MCA approves the modification or withdrawal of the tariff, or the MCA directs MaltaPost to modify or withdraw the tariff.

The MCA may review these tariffs at any time to determine whether the prices, terms and conditions are cost-oriented and non-discriminatory and in accordance with the requirements of this *ex-ante* regulatory framework. MaltaPost must ensure that all existing tariffs are appropriately published on its website. The information published must comply with the requirements outlined in **Section 3.3** above. Where the MCA has directed MaltaPost to review a tariff, in line with **Section 3.5** above, MaltaPost must publish the tariff at such time as specified by the MCA upon completion of the tariff review.

The MCA will retain its prerogative to continue monitoring the tariffs of the services forming part of the universal service provided by MaltaPost (i.e. the universal services which MaltaPost is obliged to provide as a designated USP) to ensure that the tariffs are in line with article 21 - for example, with regard to affordable tariffs and, where

²⁹ Refer to MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice.

necessary, uniform tariffs³⁰ - and article 22³¹ of the Act. Where the MCA is of the opinion that MaltaPost is failing, or has failed, to comply with any of these requirements, the MCA may give a direction to MaltaPost to ensure compliance with requirements concerned (refer to **Section 4.2** below).

³⁰ Prices shall be affordable (such that all users, independent of geographical location, and, in the light of specific national conditions, have access to the services provided) and whenever necessary for reasons related to public interest (refer to Recital 38 of the Directive) uniform tariffs may be applied (the application of a uniform tariff does not exclude the right of the designated USP, or USPs, to conclude individual agreements on prices with customers). Article 12 of the Directive, as transposed in article 21 of the Act, relates to tariffs for each of the services forming part of the universal service which covers both national and cross-border services.

³¹ Cross border postal articles collected and forwarded as part of the universal service must comply with article 22 of the Act - Agreements on terminal dues. USP's charge each other for the termination rates for processing and delivering incoming postal articles from other countries.

4. Safeguarding the Provision of the Universal Service

To effectively regulate the postal sector in a fully liberalised and competitive market environment, the MCA needs to put in place a suitable regulatory framework that facilitates fair and effective competition whilst continuing to safeguard the provision of an efficient universal service.

In a fully liberalised and competitive market environment the MCA intends to safeguard the provision of the universal service via a combination of:

- reliance on market forces where it is feasible and appropriate to do so;³² and
- the continued designation of MaltaPost as the universal service provider (and/or the designation of other USPs) to provide the universal service in circumstances in which the needs of users are not satisfactorily met by the market.

Postal operators providing services within the scope of the universal service require a licence in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service. Moreover, a licensed postal operator may be made subject to a set of universal service obligations via its designation as a USP (refer to **Appendix 01**).

4.1 Universal Service Obligations

The universal service obligations include the delivery and collection, on every working day, of a minimum set of universal services (both inland and cross-border services) required to be provided to any person who requests such services. The universal service obligations also comprise of the following three main service features:

- Reasonable accessibility – to comply with minimum distribution of access points to the postal network, such as letter-boxes and post offices in Malta, as determined by the MCA;³³
- Reasonable quality – to comply with minimum quality of service standards set by the MCA for the collection and delivery of the universal services;³⁴ and

³² In cases when the MCA has a high degree of confidence to rely upon licensed postal operators motivated by normal commercial considerations to provide universal services which will meet or exceed the established universal service obligation in terms of affordability, access and quality of services standards.

³³ The MCA monitors and ensures that an adequate number of access points to the postal network (e.g. letterboxes and postal offices) are available throughout Malta.

³⁴ The MCA imposes QoS targets on the designated USP with regard to the provision of the universal services (e.g. next day delivery requirements) in line with the Act. In reviewing the QoS requirements the MCA takes into account public expectations, competition in the postal markets, and the minimum QoS level (both for inland and cross border mail) of the universal service required in line with the Act and the Directive. The designated USP, similar to other 'non-designated' postal operators providing services within the scope of the

- Affordable pricing – to comply with the tariff principles specified in article 21 and article 22 of the Act and the MCA’s price control framework.

4.2 Designated Universal Service Provider

MaltaPost is currently the only designated USP required to fulfil a set of universal service obligations. MaltaPost's designation as a USP comes with a number of other obligations and privileges due to the larger interests to protect mail integrity and public interest.³⁵

These include, among other things:

- Printing and issuing of the national stamp - As national postage stamps carry the name of the country and not the name of the postal operator it may not be feasible to allow multiple postal operators to issue the same set of national stamps for pre-payment purposes. Such a state of affairs would, quite plausibly, cause consumer confusion and significant difficulty in ensuring that the correct postal operator is being paid for the services to be provided.³⁶
- Management of the National Postal Code System - It is not deemed efficient or effective to have more than one postal operator managing a nation-wide postcode system. For greater operational efficiency, and for optimal utilisation of postal codes in Malta, a centralised postal code management system is preferred. This management responsibility is currently placed with MaltaPost, as the designated USP, and there does not appear to be any valid reason why MaltaPost should not continue playing this role after full market opening.³⁷
- Designated operator for the purposes of the Universal Postal Union (UPU)³⁸ - The designation of a postal operator as a Malta postal administration in the UPU is not given by default to any postal operator. The MCA notes that so far, in those countries that have liberalised their postal services markets, the incumbent designated USP remains the only designated operator from their country for the purposes of the UPU.

In line with other jurisdictions that have completely liberalised the postal sector, MaltaPost, as the incumbent designated USP, is expected to continue to be the only

universal service, has flexibility in terms of quality and contractual terms on all of its 'non-universal' postal services within the scope of the universal service.

³⁵ These rights and obligations on MaltaPost only apply in respect of the universal services it is obliged to provide as the designated USP.

³⁶ Other postal operators who wish to produce their own pre-payment impressions or stamp imprints are allowed to do so under the following conditions: (i) no use of the country name; (ii) not used for international postal articles within the framework of the UPU regulations; and (iii) must obtain approval from the Minister responsible for postal matters in line with Article 36 of the Act.

³⁷ MaltaPost adopted a nation-wide 7-digit postal code system which has allowed it high efficiency and effectiveness in, amongst others, in mail sorting and delivery.

³⁸ Postal services provided by certain postal operators called designated operators. A designated operator is a "governmental or non-governmental entity officially designated by the member country to operate postal services and fulfil the related obligations arising out of the Act of the Union on its territory"

designated postal operator required to perform a set of universal service obligations.³⁹ When considering whether to impose universal service obligations on another postal operator(s),⁴⁰ not all of the above-mentioned privileges may be extended to the other postal operators due to the larger interests to protect mail integrity and public interest.

When a particular universal service can be ensured by relying solely on market forces, the obligation to provide such a service by a designated USP may be withdrawn, in line with the Act and the Regulations.

4.2.1 Tariff Regulation

In line with the proposed *ex-ante* framework for the regulation of competition, tariff regulation of the universal services provided by a designated USP will be controlled through the market review procedure (refer to **Section 2**).

This means that universal services which a designated USP is obliged to provide and which are not effectively competitive will be subject to the obligations applicable to an SMP postal operator (refer to **Section 3**). Where the universal services are provided under conditions of effective competition, the MCA will rely upon competitive market forces to ensure that tariffs of the universal services provided by a designated USP are cost-oriented, non-discriminatory, efficient and otherwise compliant with article 21 of the Act.

The MCA will retain its prerogative to continue monitoring the tariffs of the services forming part of the universal service provided by a designated USP (i.e. the universal services which a designated USP is obliged to provide) to ensure that the tariffs are in line with the principles specified in article 21 - for example with regard to tariff affordability⁴¹ and uniform pricing⁴² - and article 22 of the Act.

³⁹ In line with the Act and Regulations (refer to Regulation 43A), a designated USP may make a claim for providing a universal service where there is found to be a net cost which constitutes an unfair financial burden on the designated USP. On receipt of such a request and all required information in support of it, the MCA will determine whether the universal service does represent a net cost and an unfair financial burden on the designated USP, in the period to which the request relates.

⁴⁰ When considering whether to impose universal service obligations on another postal operator, the MCA may take into consideration whether a postal operator has SMP in a relevant postal services market.

⁴¹ For example, if tariffs rise to a point that they give rise to affordability issues, particularly vulnerable users, then there could be a need for the MCA to intervene to ensure that such users remain able to access the basic universal service. In addition, the MCA needs to ensure the provision of a free postal service for the use of blind and partially-sighted persons.

⁴² In line with article 21 of the Act, with the consent of the Minister, the Authority may decide that a uniform tariff shall be applied throughout Malta (and/or cross-border) to postal services provided at single piece tariff and to other postal articles (whenever necessary for reasons related to public interest – Recital 38 of the Directive). The 'uniform rate requirement' is a legal measure that requires a universal service to be provided at rates that do not vary with the distance a postal article is transported. However, the application of a uniform tariff shall not exclude the right of the designated USP(s) to conclude individual agreements on prices with customers (refer to article 21(d) of the Act).

Where the MCA is of the opinion that a designated USP is failing, or has failed, to comply with any of these requirements, the MCA may give a direction to a designated USP to ensure compliance with requirements concerned.⁴³

The MCA will seek to secure the provision of a sustainable and efficient universal service provided by a designated USP. In doing so, the MCA will assess that the principle that prices for the universal services reflect normal commercial conditions is only departed from in order to protect public interests.⁴⁴ In pursuing these objectives, the MCA will take consideration of the specificities involved in the regulation of the conditions under which the designated USP must operate.

4.3 Access to Postal Infrastructure or Services

In line with the Regulations postal operators have a right and, when requested by other postal operators, an obligation to negotiate access with each other for the purpose of providing postal services. Where a postal operator fails to reach an agreement the postal operator involved in the dispute may request the MCA to resolve the dispute.

In 2009, the MCA issued a decision on the minimum standards necessary to pre-empt and address potential issues which are likely to arise in a multi-operator environment, and to further the interests of users of postal services within the scope of the universal service. This decision also outlined the requirements for licensed postal operators to be able to access elements of the postal infrastructure.⁴⁵ The objective of this decision, amongst other things, is to ensure the smooth functioning of a multi-operator postal services market, thus facilitating end-to-end competition⁴⁶ within the universal service area.⁴⁷ Every postal operator providing services within the universal service area is required to comply with these minimum standards and, where applicable, must establish reciprocal arrangements with other licensed postal operators. In line with this decision, at the MCA's request, MaltaPost, as the designated USP, is required to adopt and publish a reference offer that:

- specifies the applicable terms and conditions on which it will offer to share postal code information and redirection of mail information; and that

⁴³ Refer to article 76A (2)(d) of the Act whereby the MCA may issue directives to a USP to ensure compliance with the principles as stated under articles 21 and 22 of the Act. The MCA may impose a safeguard price cap, or other similar schemes, on a universal service to provide incentives for efficient universal services provision having regard to the tariff principles and the protection of the interests of users.

⁴⁴ For example, in cases where the MCA requires the designated USP to provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that all users remain able to access the basic universal service.

⁴⁵ Access to the postal infrastructure includes the physical infrastructure, such as post office boxes and infrastructure in non-physical form, such as postcodes or mail redirection information or arrangements made with others for the provision of any service.

⁴⁶ End-to-end competition refers to competition whereby a postal operator not only receives the letter from the customer but then delivers it to the recipient, by-passing the designated USP's postal network entirely.

⁴⁷ Refer to MCA (2009), Managing Common Operational Issues in a Multi-Operator Environment – Decision Notice. This decision, amongst other things, sets the minimum requirements for postal operators to allow access to elements of the postal infrastructure.

- o establishes reciprocal arrangements with other postal operators in relation to access to post office boxes, misdirected postal articles and miscollected postal articles.⁴⁸

Access to the postal infrastructure is without prejudice to the adoption of measures to ensure access to a USP's postal network, if necessary.⁴⁹ Access to the postal network relates to the systems and resources used by a USP, normally the incumbent designated USP, for the purpose of complying with its universal service obligations, including arrangements made with others for the provision of any service⁵⁰ - such as for the provision of downstream access to the sorting and delivery part of a designated USP's postal network.

As already mentioned above, a postal operator has the right to enter into negotiations with a postal operator, such as a designated USP (currently MaltaPost), with a view of concluding an agreement to access the postal network for the purpose of providing postal services. Where agreement is not reached the MCA may take steps as are necessary to resolve the dispute.⁵¹

The MCA may issue directives to a USP requiring it to meet reasonable requests for access to, and use of, specific elements of the postal network if deemed necessary.⁵² The MCA may issue such directives in situations where it considers that denial of access to the postal network, or unreasonable terms and conditions having a similar effect would create a significant barrier to entry into a postal services market by an efficient competitor, thus hinder the emergence of a sustainable competitive market at the retail level,⁵³ or would not be in the interest of the users.⁵⁴

⁴⁸ In line with the first part of Article 11a of the Directive any postal operator providing services within the scope of the universal service may be required to give access to other postal operators if it appears to the MCA that it is necessary to protect the interests of users of postal services and/or to promote effective competition.

⁴⁹ The Directive leaves it to the Member States to assess the need for and extent of regulation concerning access to certain elements of the postal infrastructure or services and to regulation access to the postal network. As regards access to the postal network, Member States must comply with Article 12, fifth indent of the Directive (as transposed in Article 21(f) of the Act), and may, in the light of national conditions, introduce other measures to ensure access to the postal network under conditions which are transparent and non-discriminatory.

⁵⁰ Refer to definition of 'Postal Network' as depicted in the Act. MaltaPost as the designated USP utilises its network to provide not only the universal service but also other postal services - which fall within or outside the scope of the universal service - and non-postal services. In addition, MaltaPost allows 'Designated Operators' of the UPU access to its postal network.

⁵¹ The MCA considers that it would be in the interest of both the postal operator concerned and the designated USP to reach a mutually acceptable agreement concerning access to the postal network, rather than to have an agreement imposed upon them. The MCA does not expect that access to a USP's postal network will be unreasonably withheld.

⁵² The MCA may by directive require the USP to provide specific access services (referred to as mandated services) to competing postal operators, for the provision of any postal services (including, for example, the provision of any letter-post service and/or bulk mail service and the domestic delivery of incoming international postal articles) on terms and conditions which would be approved by the MCA.

⁵³ Access to a designated USP's postal network would allow other postal operators to offer a nation-wide service to customers even if they only offer limited geographic coverage for their own deliveries. On the other hand, other postal operators may chose to simply purchase a universal service to ensure delivery of postal articles in areas where they do not have a delivery network.

⁵⁴ For example where the USP may control facilities that are required as an input for the provision of postal services, and replicating the facilities, or obtaining use of such facilities through other means, is infeasible or sufficiently costly or difficult that requiring another postal operator to do so would create a significant barrier to

A number of overseas jurisdictions that have fully liberalised their postal market have continued to mandate access to the incumbent designated USP's delivery infrastructure to facilitate competition or to ensure the sustainability of the universal service.⁵⁵ However, the MCA recognises that end-to-end competition is emerging as the main model of competition in most European countries and appears to coexist with a healthy universal service and an efficient incumbent designated USP.

The MCA recognises that MaltaPost, as the incumbent designated USP, enjoys significant economies of scale and scope along parts of the postal value chain, such as its sorting facilities and nation-wide daily delivery service. The MCA is of the opinion that these advantages inherited by MaltaPost as a result of its historical monopoly are not likely to become a barrier to entry for new players in a fully liberalised and competitive postal services market.

entry into postal services market by an efficient competitor. The MCA will monitor the demand for access to the postal network and may consider mandating access to specific services if it will avoid delays in commercial negotiations between competing postal operators thereby facilitating market entry by competing operators.

⁵⁵ Access competition refers to competition whereby a postal operator receives mail from customers, and then accesses a designated USP's postal network for the letter to be delivered to the final recipient.

5. Proposed Amendments to Regulations

To give effect the changes to the proposed framework for the regulation of competition, as set out in this consultation paper, the MCA is proposing corresponding amendments to the Regulations.

The amendments are necessary to ensure fair and effective competition in a fully liberalised postal market environment whilst safeguarding the provision of the universal service.⁵⁶ The amendments to the Regulations would be subject to the approval of the Minister responsible for postal matters.

The MCA is proposing a new **Part X – Market Regulation** to the current Regulations which includes the:

- powers for the MCA define relevant postal services markets;
- procedure to be used by the MCA to determine postal operators having SMP or for removing an SMP classification;
- powers for the MCA to impose, amend or withdraw specific regulatory obligations applicable to postal operators having SMP;
- regulatory obligations applicable to postal operators classified as having SMP;
- provision of reasonable access to the postal infrastructure provided within the scope of the universal service; and the
- provision of reasonable access to a designated USP's postal network, if necessary.

The proposed Regulations are attached in **Appendix 02** and further described below.

Amendment to Regulation 2 - Definitions - A new definition is proposed to be included as part of the Regulations defining a "customer" as any person who may also be a postal operator, who purchases a postal service from a postal operator.

New Regulation 69 - Defining a postal services market - This Regulation gives the necessary powers to the MCA to define the relevant postal services markets within the scope of the universal service.

New Regulation 70 - Postal Operators with Significant Market Power - This Regulation sets out the procedure for the MCA to determine whether a postal operator enjoys a position of SMP. Provided that, upon coming into force of these regulations, the MCA may designate, the postal operator designated as the universal service provider, as having significant market power in any relevant postal markets identified by the MCA.

⁵⁶ Article 81(2)(d) of the Act states that the Minister may introduce such provisions to ensure "fair competition in all practices, operations and activities relating to postal services."

New Regulation 71 - Market analysis procedure - This Regulation gives the necessary powers to the MCA to carry out a forward-looking market analysis of the relevant postal services markets, to determine whether a postal operator or operators has SMP in a postal services market(s) in line with any guidelines adopted by the MCA.

New Regulation 72 - Imposition, amendment or withdrawal of obligations on postal operators with SMP - This Regulation empowers the MCA to determine whether to impose, maintain, amend or withdraw specific regulatory obligations on postal operators following the outcome of the market analysis procedure. Where the MCA determines that a relevant postal services market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations applicable on a postal operator designated as having SMP. Where the MCA, determines that a postal services market is not effectively competitive, it shall designate postal operators as having SMP and it shall impose appropriate regulatory obligations or maintain and amend such obligations where they already exist.

New Regulations 73 to 75 - Obligations on postal operators with significant market power - A postal operator designated as having SMP in a relevant postal services market is required to provide such services in that market at cost-oriented prices, and on terms and conditions that are non-discriminatory. A postal operator designated as having SMP in a relevant postal services market shall provide such services in that market on an unbundled basis, provided that the postal operator may offer customers the option to purchase a package that contains multiple postal services and non-postal services or products.

New Regulation 76 - Approval of tariffs - This regulation requires a postal operator designated as having SMP in a relevant postal services market to submit a tariff for the written approval of the MCA prior to offering or modifying the terms and conditions on which it offers any service that it provides in that market. Provided that it shall obtain the written approval of the MCA prior to the withdrawal of the postal services that it provides pursuant to a tariff approved in accordance with this regulation. In addition, the MCA may issue directives in respect of the manner in which approved tariffs, terms and conditions, including quality of service, on which the postal operator provides the service, shall be published.

New Regulation 77 - Accounting separation - The Regulation allows the MCA to require a postal operator designated as having SMP in a relevant postal services market to keep separate accounts within its accounting system. Such an internal accounting system shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

New Regulation 78 - General access for the provision of postal services - This Regulation amends Regulation 67(1). Postal operators shall have a right and, when requested by another postal operator, an obligation to negotiate access with a view to concluding an agreement with each other for the purpose of providing postal services. Where agreement is not reached, the MCA, at its discretion and if so requested by either party to the negotiations, may take steps to resolve any dispute which may have arisen as a result of the failure to reach an agreement.

New Regulation 79 - Access to the postal infrastructure⁵⁷ - This Regulation allows the MCA to issue directives to a postal operator providing services within the scope of the universal service requiring it to permit access to other postal operators to its postal infrastructure on such conditions as the MCA may direct for that purpose. Postal infrastructure includes physical infrastructure (such as post office boxes and delivery boxes), and infrastructure in non-physical form (such as postcode information, information on change of address, redirection service, return to sender service, or arrangements made with others for the provision of any postal service). The MCA may require a postal operator providing services within the scope of the universal service to adopt and publish a reference offer which specifies the prices, terms and condition on which the postal operator will offer access to the postal infrastructure.

New Regulation 80 - Access to the Postal Network of the Universal Service Provider⁵⁸ - This Regulation amends Regulation 67(2). This Regulation allows the Authority to issue directives to a USP requiring it to meet reasonable requests for access to specific elements of the postal network on such conditions as the MCA may direct for that purpose. Access to the postal network refers to the systems and all the resources of a designated USP used for the purpose of complying with its universal service obligations, including arrangements made with others for the provision of any service. The MCA may require a designated USP to adopt and publish a reference access offer which specifies the prices, terms and condition on which the designated USP will offer access to the postal network.

New Regulation 81 - Transitory Provisions - This Regulation states that any directives and decisions however so described by the Authority and in force prior to the coming into force of these Regulations shall continue to be in force until revoked or amended by the Authority.

⁵⁷ This section transposes the first part of Article 11a of the Directive which gives Member States the right to ensure that transparent, non-discriminatory access conditions are available to elements of postal infrastructure or services provided within the scope of the universal service.

⁵⁸ This is in line with Article 11a of the Directive which gives Member States the right to adopt measures to ensure access to the postal network under transparent, proportional and non-discriminatory conditions.

6. Implementation Plan and Timelines

The table below depicts the envisaged timetable for consultations, proposed legislative amendments and decisions to put in place the revised *ex-ante* framework for the regulation of competition.

| Summary of Key Activities and Timelines | Planned |
|--|--------------------------------|
| Regulatory approach in a fully liberalised environment | |
| Publication of the consultation paper on the proposed <i>ex-ante</i> framework for the regulation of competition and proposed amendments required to the Regulations | 1st Aug 2012 |
| Publication of response to consultation paper on the regulatory framework and proposed amendments to the Regulations | Oct 2012 |
| Legal amendments | |
| Recommendations to the Minister responsible for postal matters on the proposed amendments to the Regulations | Oct 2012 |
| <i>Ex-ante</i> Regulatory framework | |
| Publication of the MCA's decision and explanatory memorandum on the <i>ex-ante</i> framework for the regulation of competition | Nov 2012 |
| Market review procedure | |
| Commencement of first round of the market review procedure | Nov 2012 |

Note:

The above-mentioned timelines may be influenced by dependencies which are not within the MCA's control. Nonetheless, the MCA will do its utmost to follow the assignment to conclusion within the envisaged timelines.

7. Requests for Comments

The MCA would like to seek the views and comments from the industry, members of the public and other interested stakeholders on the regulatory framework to be used by the MCA in a fully liberalised and multi-operator postal environment.

Respondents should clearly link each view or comment to the relevant section. Any proposed amendments or revisions should be clearly explained and supported by respondents. Supporting material may be placed in an annex.

All views and comments should be submitted in writing in soft copies (such as Microsoft Word or PDF Format), and should reach the MCA by the **18th September 2012**. Respondents are required to include their personal or company particulars, correspondence address, contact number and email address in their submissions.

The MCA will make public all or parts of any submissions made in response to this consultation and disclose the identity of the source. Respondents are required to clearly mark any part of the submission that is considered commercially sensitive and place the information separately as an annex to the submission.⁵⁹ The MCA will not disclose information identified as commercially sensitive or confidential but will take them into consideration in its review.

All comments should be addressed to:

**Chief, Policy and Planning
Malta Communications Authority
Valletta Waterfront
Floriana FRN1913, Malta
Tel: +356 21 336840
Fax: +356 21 336846**

Soft copies should be made via email to: info@mca.org.mt

Respondents may also submit a hardcopy via fax to fax number: (+356) 21 336846.

⁵⁹ In accordance with the MCA's confidentiality guidelines and procedures published on the MCA's website.

Appendix 01 - Licensed Postal Operators

Postal operators providing services within the scope of the universal service require a licence from the MCA.⁶⁰ Such a licence is required in order to guarantee compliance with the essential requirements and to safeguard the provision of the universal service.⁶¹ Moreover, a postal operator providing services within the scope of the universal service may be made subject to universal service obligations - as a designated USP.

Through its authorisation framework, the MCA imposes particular conditions and obligations, identified in the Act and in the Regulations, under which postal services are offered. A postal operator is required to comply with the terms and conditions of the authorisation, as well as with any applicable obligations or requirements, however described, emanating from the Act, all other laws, directives and decisions however so described of the MCA.

MaltaPost, in its capacity as one of a number of postal operators operating in a fully liberalised postal market, is subject to the same obligations and has the same rights as all other licensed postal operators. However, when acting in its capacity as the designated USP, MaltaPost is subject to certain additional obligations and rights (including, amongst others, the range of universal services that MaltaPost must provide to meet the needs of users) as set out in the Act.

Presently, postal operators providing services within the scope of the universal service, other than the designated USP, require a 'Licence to provide non-reserved postal services within the scope of the universal services'. MaltaPost, on the other hand, has a tailor-made licence for the provision of all services within the scope of the universal services, by virtue of its long-standing role.

In view of this, and in light of the amendments to the Postal Services Act carried out in July 2010, which place the responsibility for licence issuance on the MCA, a revision of

⁶⁰ A postal service is considered to be within the universal service area (also referred to as within the scope of the universal service) if:

- the postal service is within the description of the universal services as set out in the Act; or
- if the postal service is within the description of the universal service set out in the Act, but the collection and delivery is not made on each of the working days as required in the Act, or the postal service is not provided throughout Malta, or the postal service is not provided at an affordable price in accordance with a uniform tariff applicable throughout Malta pursuant to the Act; or
- the postal service is of a kind that, having regard to postal service users, could reasonably be said to be interchangeable with a postal service that falls within the description a universal service set out in the Act.

For a detailed description of the postal services that are considered as forming part of the universal service including the definition of those services that are considered as falling within the scope of the universal service area, refer to the MCA's (2011) decision entitled 'Regulatory Direction on Specific Aspects of the Universal Postal Service'. Each postal operator providing services falling within the scope of the universal service requires a licence from the MCA under the Act.

⁶¹ Refer to MCA (2011) Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice. **Appendix 01** of this decision sets out the specific set of universal services.

the existing licence structures, for these to be compatible with a fully liberalised market environment, is required.

In addition to this consultation document, the MCA will also be shortly issuing a separate consultation document on the principles relative to the postal authorisation structure to be used in a fully liberalised environment.

Table 2 overleaf outlines a non-exhaustive list of the licence conditions and obligations applicable to postal operators providing services within the scope of the universal service and the universal service obligations related to a designated USP (i.e. obligations which solely relate to a designated USP).

Table 2 also outlines the specific *ex-ante* obligations applicable to licensed postal operators that are classified as having SMP in a postal services market (i.e. obligations which solely relate to a licensed postal operator classified as having SMP).

Table 2: Postal operators licensed to offer services within the scope of the universal service

Obligations applicable to all postal operators providing services within the scope of the universal service

- Service provision
- Complaint handling
- Mail Integrity
- Provision of Information
- Accounting separation – Revenues (information on turnover distinguishing between services with the scope of the universal service and other activities)
- Decisions of the MCA related to postal operators providing services within the scope of the universal service
- Obligations emanating from the Act related to licensed postal operators

Specific obligations applicable to a postal operator(s) in its capacity as a designated USP

- Provision of universal services that the designated USP must provide
- Minimum quality of service standards / targets
- Access to basic counter services
- Accounting Separation – Universal Service Obligation
- Ensuring the universal service tariff principles
- Decisions of the MCA related to a designated USP
- Obligations emanating from the Act related to a designated USP

Specific obligations applicable to postal operators classified as having SMP in a relevant postal services market(s)

- Provision of services to customers on terms and conditions, and at cost-oriented tariffs that are non-discriminatory
- Ex-ante approval of postal service tariffs and terms and conditions
- Publication of postal service tariffs and terms and conditions
- Accounting separation to ensure tariffs are cost-oriented and non-discriminatory

Table 2: An non-exhaustive list of obligations governing postal operators licensed to provide services within the scope of the universal service in view of the proposed framework for a fully liberalised and competitive market environment.

Appendix 02 - Proposed Amendments to the Regulations

The Act provides the possibility for the Minister responsible for postal services to make regulations in respect of any of the functions of the MCA or for the better carrying out of the provisions of the Act.⁶² Article 81(2) (d) of the Act specifically states that the Minister may introduce such provisions to ensure “fair competition in all practices, operations and activities relating to postal services.”

In order to provide more legal clarity and to effectively regulate the postal sector in a fully liberalised and competitive market environment, the MCA intends to make proposals to Government to amend the current Regulations - namely the Postal Services (General) Regulations [SL 254.01 of the Laws of Malta].

The proposed amendments to the Regulations are depicted overleaf.

⁶² Refer to Article 81(1) of the Act.

Proposed Postal Services (General) (Amendment) Regulations, 2012

IN EXERCISE of the powers conferred by article 81 of the Postal Services Act, the Minister for Infrastructure, Transport and Communications, after consultation with the Malta Communications Authority, has made the following regulations:

Title.

L.N. 328 of 2005.

1. (1) The title of these regulations is the Postal Services (General) (Amendment) Regulations, 2012 and they shall be read and construed as one with the Postal Services (General) Regulations, 2005, hereinafter referred to as "the principal regulations".

(2) These regulations shall be deemed to have come into force on the **XX/XX/2012**.

Amends regulation 2 of the principal regulations

"customer" means any person who may also be a postal operator, who purchases a postal service from a postal operator".

Addition of new Part X to the principal regulations

3. Immediately after regulation 68 of the principal regulations, there shall be added the following new part:

Part X

Market Regulation

Defining a postal services market

69. (1) The Authority shall define the relevant postal services markets within the scope of the universal service appropriate to national circumstances.

(2) This is without prejudice to any other relevant postal services markets that the Authority may define in accordance with the principles of competition law.

Postal operators with significant market power

70. (1) The Authority shall determine whether postal operators have significant market power in accordance with this regulation and taking into account any guidelines however so described by the Authority:

Provided that, upon coming into force of these regulations, the Authority may designate the postal operator designated as the universal service provider, as having

significant market power in any relevant postal services market within the scope of the universal service as identified by the Authority.

(3) A postal operator shall be deemed to have significant market power if either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately users.

(4) Where a postal operator has significant market power on a specific relevant postal services market, it may also be designated as having significant market power on a closely related postal services market where the links between the two markets are such as to allow the market power held on one market to be leveraged into the other market, thereby strengthening the market power of the postal operator.

Market analysis procedure

71. (1) The Authority may, at any time as it may deem necessary, after having defined a postal services market in accordance with regulation 69, carry out an analysis of such a market taking into account any guidelines however so described by the Authority.

(2) Where the Authority is required under sub-regulations (3) and (4), or regulations 73 to 77, to determine whether to impose, maintain, amend or withdraw specific obligations on postal operators, it shall determine on the basis of its market analysis referred to in sub-regulation (1) whether a relevant postal services market is effectively competitive.

(3) Where the Authority determines that a postal services market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in sub-regulation (2) applicable to a postal operator with significant market power:

Provided that in cases where a postal operator had previously been designated as having significant market power and such obligations already exist, the Authority shall, after giving reasonable notice to any parties which the Authority considers to be affected by such withdrawal, withdraw such obligations onerous on the postal operator concerned.

(4) Where the Authority, determines that a postal services market is not effectively competitive, it shall designate postal operators as having significant market power in accordance with regulation 70, and it shall impose on such postal operators appropriate regulatory obligations referred to in sub-regulation (2), or maintain and amend such obligations where they already exist.

(5) The Authority shall, when necessary, carry out a further analysis of a relevant postal services market referred to in sub-regulation (1), and sub-regulations (2) to (4) shall apply accordingly.

Imposition, amendment or withdrawal of obligations on postal operators with significant market power

72. (1) The Authority shall impose the obligations identified in regulations 73 to 77, as appropriate, on any postal operator having significant market power in a relevant postal services market as a result of a market analysis carried out in accordance with these Regulations.

(2) Unless otherwise provided in the Act or in these Regulations, and without prejudice to the need to comply with international commitments, the Authority shall not impose any of the obligations set out in regulations 73 to 77 on postal operators who have not been designated as having significant market power in accordance with sub-regulation (1):

Provided that regulations 73 to 77 are without prejudice to the power of the Authority to issue any directives to any postal operator as it may be authorised to issue at law, including but not limited to any such directives issued in respect of article 76A of the Act.

Obligation to provide services at cost-oriented prices

73. In accordance with the provisions of regulation 72, a postal operator designated as having significant market power in a relevant postal services market, shall provide such services in that market to customers at cost-oriented prices, that is to say, that prices shall take account of, and reflect the costs of, providing the postal service or part of the postal service in that market.

Obligation of non-discrimination

74. (1) In accordance with the provisions of regulation 72, a postal operator designated as having significant market power in a relevant postal services market must provide such services in that market to customers:

- (a) at prices, terms and conditions that are non-discriminatory; and
- (b) must not discriminate in favour of itself, or of its subsidiaries or partners, in the provision of such services in that market.

(2) The obligation to provide such services on a non-discriminatory basis requires that differences in the prices, terms and conditions for comparable postal services must be based on objective differences, such as, but not limited to, variations in the cost of the service provided, variations in the quantity or quality of the service provided, or variations in the duration of the service agreement period.

Obligation of provision of services on an unbundled basis

75. (1) In accordance with the provisions of regulation 72, a postal operator designated as having significant market power in a relevant postal services market, shall provide such services in that market on an unbundled basis.

(2) Without prejudice to the generality of sub-regulation (1) the postal operator shall not require that, as a condition of purchasing such a service, a customer shall also purchase any other postal service or non-postal service or product:

Provided that the postal operator may offer customers the option to purchase a package that contains multiple postal services and non-postal services or products.

Approval of Tariffs and Publication

76. (1) In accordance with the provisions of regulation 72, and in accordance with any directives that the Authority may issue, a postal operator designated as having significant market power in a relevant postal services market shall submit a tariff for the written approval of the Authority prior to offering or modifying the terms and conditions on which it offers any postal service that it provides in that market, including postal services designed for specific customers:

Provided that where a tariff has been approved in accordance with this regulation the postal operator shall obtain the written approval of the Authority prior to the withdrawal of the postal service that it provides.

(2) The Authority may issue directives to a postal operator designated as having significant market power in a relevant postal services market in respect of the manner in which approved tariffs, terms and conditions (including quality of service) on which the postal operator provides the service, shall be published.

Accounting separation

77. (1) Without prejudice to the provisions of article 23 of the Act, in accordance with regulation 72 and with any directives as the Authority may issue, a postal operator designated as having significant market power in a relevant postal services market is required to keep separate accounts within its accounting system.

(2) An internal accounting system as referred to in subregulation (1) shall operate on the basis of consistently applied and objectively justifiable cost accounting principles:

Provided that the Authority may specify the format and accounting methodology to be used by a postal operator found to have significant market power.

(3) Compliance with the cost accounting system, including related regulatory accounts shall, at the choice of the Authority, be verified by the Authority or by a suitably qualified independent body approved by the Authority.

(4) The postal operator concerned shall also publish in its annual accounts a statement concerning compliance by it with any cost accounting system imposed under this regulation.

General Access for the Provision of Postal Services⁶³

78. (1) A postal operator shall have a right and, when requested by another postal operator, an obligation to negotiate access with a view to concluding an agreement with each other for the purpose of providing postal services and shall serve a notice on the Authority upon the commencement of any such negotiations.

(2) The Authority shall, if so requested in writing by either party to the negotiations, specify the period within which the negotiations referred to in sub-regulation (1) shall be completed.

(3) Where agreement is not reached within the period specified by the Authority under sub-regulation (2), the Authority, at its discretion and if so requested by either party to the negotiations, may take steps to resolve any dispute which may have arisen as a result of the failure to reach an agreement:

Provided that the resolution of any such dispute shall be in accordance with procedures established and maintained by the Authority.

(4) A postal operator which acquires information from another postal operator before, during or after the process of negotiating access arrangements shall use that information solely for the purpose for which it was supplied, and shall respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other person including any subsidiaries or partners, for whom such information could provide a competitive advantage.

Access to the Postal Infrastructure

79. (1) The Authority may issue directives to a postal operator providing services within the scope of the universal service, requiring it to permit access to other postal operators to its postal infrastructure on such terms and conditions as the Authority may direct for that purpose, in particular, in situations where the Authority considers that denial of access or unreasonable terms and conditions having a similar effect, hinder the emergence of a sustainable competitive market or would not be in the interest of the user.

(2) Postal infrastructure includes physical infrastructure such as post office boxes and delivery boxes, and infrastructure in non-physical form such as postcode information, information on change of address, redirection service, return to sender service, or arrangements made with others for the provision of any postal service.

(3) The Authority may require a postal operator to adopt and publish a reference offer which specifies the terms and conditions on which the postal operator will permit access to other postal operators to its postal infrastructure.

(4) The Authority may specify the precise information to be made available in a reference offer, including provisions related to the type of access to be

⁶³ This Regulation will replace Regulation 67(1) and (3) of the current Regulations.

provided, the price of access, terms and conditions relating to matters other than price, and the level of detail required and the manner of publication.

(5) The Authority may impose changes to reference offers to give effect to the obligations imposed under these Regulations.

Access to the Postal Network of a Universal Service Provider⁶⁴

80. (1) The Authority may issue directives to a universal service provider requiring it to meet reasonable requests for access to, and use of, specific elements of the postal network on such terms and conditions as the Authority may direct for that purpose, in particular, in situations where the Authority considers that denial of access, or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market or would not be in the interest of the user.

(2) The Authority may require a universal service provider to adopt and publish a reference access offer which specifies the terms and conditions on which the universal service provider shall permit access to specific elements of the postal network, which shall be sufficiently unbundled to ensure that postal operators are not required to pay for facilities which are not necessary for the services requested:

Provided that the universal service provider in doing so shall give a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices.

(3) The Authority may specify the precise information to be made available in a reference access offer, including provisions related to the type of access to be provided, the price of access, terms and conditions relating to matters other than price, and the level of detail required and the manner of publication.

(4) The Authority may impose changes to reference access offers to give effect to the obligations imposed under these Regulations.

Transitory Provisions

81. Any directives and decisions however so described issued by the Authority and in force prior to the coming into force of these Regulations shall continue to be in force until revoked or amended by the Authority.

⁶⁴ This Regulation will replace Regulation 67(2) of the current Regulations.

Bibliography

- Alex Kalevi Dieke, James I. Campbell Jr., Nicole Angenendt, Gernot Müller (2009), The Role of Regulators in a More Competitive Postal Market WIK – Consult Final Report, Bad Honnef: Wik Consult
- Campbell Jr., James I., Dieke, Alex Kalevi & Niederprum, Antonia (2005), The Evolution of the Regulatory Model for European Postal Services. WIK – Consult Final Report, Bad Honnef: Wik Consult
- ComReg - Postal Regulatory Framework – Implementation of the Communications Regulation (Postal Services) Act 2011 – July 2012
- Directive of 2008/6/EC of the European Parliament and the of the Council, amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services
- European Committee for Postal Regulation (CERP) – Recommendation on best Practices for Price Regulations – October 2009
- European Commission (2002), Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services - 2002/C 165/03
- Eurostat Glossary – Data Collection on Postal Services (Breakdown of Traffic)
- Info-Communications Development Authority of Singapore – Decision and Explanatory Memorandum on the Framework for Further Liberalisation of the Postal Services Sector in Singapore - 2007
- Info-Communications Development Authority of Singapore – Postal Services Competition Code 2008
- Info-Communications Development Authority of Singapore – Postal Services Operational Code 2008
- Irish Communications Regulation (Postal Services) Act, 2011
- MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice
- MCA (2009), Review of Quality of Service (QoS) Targets and Requirements to be Achieved by MaltaPost Plc – Decision Notice
- MCA (2009), Managing Common Operational Issues in a Multi-Operator Environment – Decision Notice

- MCA (2008), Universal Service Obligations (Accessibility, Daily Delivery, Provision of Information) - Decision Notice
- MCA (2006), Minimum Standards for Protecting the Integrity of Mail - Decision Notice
- MCA (2004), Market Review Methodology for the Electronic Communications Sector.
- United Kingdom Postal Services Act, 2011