

Regulating the Postal Sector in a fully Liberalised Market

An *ex-ante* framework for the regulation of competition

Response to the Consultation Document and Next Steps

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Executive Summary

The Malta Communications Authority's ('MCA') 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.

In line with the third European Postal Directive, 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 ('MaltaPost'), as the incumbent designated universal service provider ('USP'), 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.

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 introduction of a market review procedure for the postal sector will allow the MCA to define the different postal markets within the universal service area and assess competition within these markets. In the absence of effective competition the MCA will classify one or more postal operators as having Significant Market Power (SMP). 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.

A market review procedure, to determine the presence or otherwise of SMP on the part of any particular operator, will benefit all market players by ensuring a level playing field for all postal operators providing postal services within the universal service area. The market review procedure will allow postal operators, including MaltaPost, the necessary flexibility to operate in postal services markets that are effectively competitive.

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. MaltaPost will continue to be designated as the USP required to provide a minimum set of universal services. Where a particular universal service can be ensured by relying solely on market forces the universal service obligation may be withdrawn.

Consultation Process

On the 1st of August 2012 the MCA published a consultation document entitled 'Regulating the Postal Sector in a fully Liberalised Market - An ex-ante framework for the regulation of competition'.¹

This consultation document ('Consultation') outlined the MCA's proposed approach for regulating the postal sector in a fully liberalised market environment. Moreover, to give effect to the proposed *ex-ante* framework for the regulation of competition, the Consultation proposed corresponding amendments to the Postal Services (General) Regulations ('Regulations').

A total of three responses were received by the closing date of the Consultation. The comments received by the MCA largely reflected the different positions of the respondents within the postal services market.

The three respondents to the Consultation were, in alphabetical order:

- Express Association of Malta²
- Fortytwo Corporate Services on behalf of Mailbox Services Limited
- MaltaPost Plc

The MCA is grateful for the comments made in the response to the Consultation.

In general, the respondents agreed with the need for an appropriate *ex-ante* framework for the regulation of competition in a fully liberalised market environment that ensures a level playing field and safeguards the provision of the universal postal service. In some instances, however, the approaches proposed did not tally. No changes to the draft amendments to the Regulations annexed to the Consultation were proposed by the respondents.

This document provides the salient points of the feedback provided by the respondents to the issues and proposals raised in the Consultation³ and the MCA's reflections on the feedback provided, together with conclusions and envisaged next steps.

¹ Refer to the Consultation Document:

<http://www.mca.org.mt/consultation/regulating-postal-sector-fully-liberalised-market-consultation-mcac114312>

² Airsped Express Ltd, Airswift Couriers Ltd, Arrow Express Ltd, C&C Express Ltd, DHL International Ltd and Global Parcels Ltd.

³ The detailed responses are available for viewing at the MCA's office.

Next Steps

The MCA will now submit the proposed amendments to the Regulations, as depicted in the Consultation, to the Minister responsible for postal matters for the necessary approval, and once this is obtained, the regulations will be published and will come into force by the established deadline.

Following the publication and coming into force of the proposed amendments to the Regulations the MCA will designate MaltaPost as having SMP in the following postal services markets:

- Letter-post services market
- Bulk letter-post services market
- Registered letter-post services market
- Parcel-post services market

In addition, the MCA will commence with the first round of the market reviews in line with the procedure outlined in **Appendix 01** of this document.⁴

⁴ Also refer to the Consultation - **Section 2** - An Ex-ante Framework for the Regulation of Competition and **Section 3** – Obligations on Operators having Significant Market Power.

1. Responses Received to the Consultation

This section summaries the responses received to the Consultation and the comments made by the MCA.

1.1 Summary of Responses – Express Association

The respondent's views are summarised below:

- The Express Association agrees with the MCA that express/courier postal services fall outside the scope of the universal service and therefore there is no reason for the imposition of new regulatory obligations on operators providing express/courier postal services.
- The Express Association understands that the market review procedure will apply only to postal operators providing postal services within the universal service area and therefore does not apply to postal operators who provide express/courier postal services.
- The Express Association welcomes the MCA's initiative to identify the relevant postal services markets, opening the postal services markets to competition and providing for any anti-trust activities, all within the scope of the universal service area.

Comments by the MCA

- As noted in the Consultation, the market review procedure will apply to postal operators authorised to provide postal services within the universal service area.⁵
- Postal services that fall outside the scope of the universal service, such as express/courier postal services,⁶ are in the main only required to provide assurance as to their adherence to the essential requirements (such as those relating to mail integrity and complaints handling) as long as their postal services are manifestly shown to be outside of the scope of the universal service. The MCA will continue to ensure that postal operators providing services outside the scope of the universal service that start to offer additional postal services which fall within the scope of the universal service are appropriately authorised to carry out such activities. This is particularly important in order to safeguard the provision of the universal postal service in Malta.

⁵ Refer to MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice (**Decision 1** - Services within the Scope of the Universal Postal Service).

⁶ Refer to MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice (**Decision 4** – Express Mail Services).

- It is noted that the MCA regulates the postal services market by, amongst other things, applying *ex-ante* regulatory intervention (*ex-ante* regulation refers to 'before the fact' anticipatory regulation, an example of which is to require an SMP operator to perform certain obligations in order to guard against anti-competitive conduct). Presumably, the reference to anti-trust activity is one that refers to *ex-post* competition issues as may arise. The MCA does not have a mandate to deal with matters contemplated under the Competition Act (Cap 379). Such matters fall under the purview of the Malta Competition and Consumer Affairs Authority (MCCAA) whose mandate extends to, amongst other things, sanctioning mergers and acquisitions from a market concentration standpoint.

1.2 Summary of Response – Mailbox Services

- Mailbox Services agrees with the MCA's efforts to ensure a balance between ensuring the universal postal service in Malta and creating an environment which promotes competition.
- Mailbox Services agrees with the market review procedure as proposed by the MCA and agrees with the proposed postal market segments identified in the Consultation.
- Mailbox Services agrees that MaltaPost should be designated as having SMP in all the postal services markets identified in the Consultation as the outset in order to ensure a smooth transition to a fully liberalised and competitive market. Mailbox Services agrees that an SMP status should remain until the SMP classification is removed following a market review procedure.
- Mailbox Services commented on the percentage market share for an operator to be designated with SMP status. Mailbox Services noted that a 40% market share is purely indicative and that competition law has many times lowered this threshold to as low as 25% if other factors exist which indicate that a market player could foreclose the market or effect it negatively to the detriment of competition and consumers alike.
- Mailbox Services agrees with the two approaches mentioned in the Consultation with regard to the process for the removal of an SMP classification upon a postal operator (refer Section 2.4 of the Consultation). In the first approach Mailbox Services considers the time-frame to be adequate and sufficient. In the second approach, whereby an SMP operator may request for a reclassification if accompanied by verifiable data to support its request, Mailbox Services requested clarification on whether, in such cases, an unscheduled market review procedure will be carried out.
- Mailbox Services noted the need for additional information on timeframes to be followed by the MCA from the submission of a tariff until it is approved. Additional information is also needed on the frequency that an SMP postal operator would be required to provide a copy of its separated accounts.

- Mailbox Services noted the importance of a Reference Offer which would allow new market entrants access the incumbent's postal network and elements of the postal infrastructure.

Comments by the MCA

- As mentioned in the Consultation, a position of SMP is found by reference to a number of criteria and its assessment is based on a forward looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of SMP, it is unlikely that a postal operator without a significant share of the relevant market would be in a position of SMP. Postal operators with market shares of no more than 25% are not likely to enjoy a position of SMP on the market concerned. 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 SMP even with lower market shares, as SMP may occur without the existence of a large market share. 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 SMP.
- With regard to the process whereby a postal operator classified as having SMP may request a reclassification if accompanied by verifiable data to support its request, the MCA notes that, before granting or denying a request, the MCA will carry out a market analysis procedure and consult on the outcome of the market analysis. The MCA will seek to issue its final decision on whether to remove or retain an SMP classification within a reasonable timeframe from the close of a public consultation.
- Information on the procedure and timeframes which will be followed from the submission of a proposed tariff until approved and the timeframes for submission of separated accounts will be further described in a separate decision following the imposition of such *ex-ante* remedies on an SMP postal operator. Nevertheless, the MCA notes that, in general, once a proposed tariff is received, the MCA will either accept or reject the proposed tariff within a reasonable timeframe. If the MCA rejects the proposed tariff it will provide a statement of the basis for its rejection. Where the MCA determines that a proposed tariff would be appropriate, it may take any of the following actions: extend the review period; seek additional information from the postal operator; conduct an audit on the operator; seek public comments; allow the proposed tariff to go into effect subject to specific conditions that the MCA may impose. The MCA will provide a statement on the basis for the acceptance of a proposed tariff.
- Postal operators 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. The Regulations allow the MCA to

issue directives to a USP requiring it to meet reasonable requests for access to the postal network on such conditions as the MCA may direct for that purpose, in particular, in situations where the MCA 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.⁷ The MCA is of the opinion that currently there is no justifiable reason to mandate access to the incumbent USP's postal network. The MCA believes that it would be in the interest of both the postal operator requesting access and the designated USP to reach a mutually acceptable agreement rather than have an agreement imposed upon them.

- The MCA refers to the MCA's Decision entitled "Postal Sector – Managing Common Operational Issues in a Multi-Operator Environment", dated 1st December 2009,⁸ with regard to access to elements of the postal infrastructure.

1.3 Summary of Response – MaltaPost

The respondent's views are summarised below:

- MaltaPost stated that the creation of a level playing field is essential for the commercial viability of MaltaPost as the designated USP.
- MaltaPost disagrees that it should be designated as having SMP in postal services markets identified in the Consultation a priori. Doing so would be discriminatory against MaltaPost and would still not achieve the MCA's objective of ensuring a level playing-field.
- MaltaPost noted that consumers are switching to substitutable electronic services (e-mails, e-invoicing, e-payments, e-cards, e-banking, etc). MaltaPost noted that it is evident that there already exists effective competition in the postal services market and there are no significant barriers for an operator to enter the market. MaltaPost is of the opinion that full deregulation should take place allowing market forces to shape the service as part of a wider communications market.
- MaltaPost is of the opinion that an efficient and affordable high quality universal service with fair market conditions conducive to effective competition is an impossible objective unless the USP is appropriately compensated.
- MaltaPost is of the opinion that it does not have a dominant position in the universal service area and is burdened with the universal service obligations – a situation that is no longer sustainable.

Comments by the MCA

⁷ Access to the USP's postal network relates to the systems and resources used by the USP for the purpose of complying with others for the provision of any postal service – such as for the provision of downstream access to the sorting and delivery party of the USP's postal network.

⁸ Refer to: http://www.mca.org.mt/sites/default/files/articles/Op_issues_-_postal_sector%2C_DN_Nov_09.pdf

- The MCA is of the opinion that it is reasonable for MaltaPost to be designated as having SMP in all the identified postal services markets at the outset. MaltaPost currently maintains a high market share in all markets within the universal service area. In addition, MaltaPost has a number of competitive advantages such as ubiquity of the postal network and service offering, ability, brand strength and consumer trust. Furthermore, MaltaPost is already 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.⁹ An SMP classification in the identified postal services markets at the outset is therefore required in order to ensure a smooth transition to a fully liberalised and competitive market. The MCA reiterates that such a classification is not permanent and would be removed if the MCA determines that MaltaPost no longer possesses SMP in one or more postal services markets following a market review procedure.

- Postal regulation pursues two key aims (i) ensuring universal service provision and (ii) preventing the abuse of market power by postal operators. The MCA notes that, in line with the Postal Services Act, 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.¹⁰ So far the policy has been for the universal service obligation to be provided without the need for funding.

⁹ Refer to MCA (2011), Regulatory Direction on Specific Aspects 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 postal service).

¹⁰ Refer to Regulation 43A of the Regulations. Also refer to Recital 26 and 29 and Article 7 of the Third European Postal Services Directive 2008/06/EC amending Directive 97/67/EC.

2. Next Steps

The Consultation outlined the amendments required to existing Regulations. These amendments are necessary to ensure fair and effective competition in a fully liberalised market environment whilst safeguarding the provision of the universal service.

The MCA will now submit the proposed amendments to the Regulations as depicted in the Consultation to the Minister responsible for postal matters.

Following the publication and coming into force of the proposed amendments to the Regulations, the MCA will designate the incumbent USP, MaltaPost, as having SMP in the postal services markets identified in the Consultation:

- Letter-post services market
- Bulk letter-post services market
- Registered letter-post services market
- Parcel-post services market

In addition, the MCA will commence with the first round of market reviews in line with the process depicted in **Appendix 01** of this document. The MCA expects to be in a position to consult on the outcome of the first round of market reviews by the end of the first half of next year.

Appendix 01 – A Market Review Procedure for the Postal Sector

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

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

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.

1.1 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.

The existence of any demand and supply-side substitution may be determined through the 'hypothetical monopolist test'.¹¹ 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.

¹¹ 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.

The main competitive constraints 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.

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.

1.2 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 on which specific *ex-ante* regulation may be warranted (refer to **Table 1** below).

The relevant postal services markets 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 show that the market is effectively competitive.

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.¹²

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 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.

¹² The MCA will use both 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).

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.

3. Classifying an Operator as having Significant Market Power

In order to ensure a smooth transition to a fully liberalised and competitive market environment, upon publication and the bringing into force of the proposed amendments to the Regulations, the MCA will classify MaltaPost, as the incumbent USP, as having SMP in the postal services markets identified by the MCA (refer to **Table 1** above).

MaltaPost will therefore be subject to specific regulatory obligations applicable to postal operators having SMP at the outset. Such a classification will apply until the MCA reclassifies MaltaPost as not having SMP 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 postal operator as having SMP in any relevant postal services market, if it determines that the postal operator has SMP. A postal operator classified as having SMP in a postal services market is required to comply with specific regulatory obligations in that market.

Prior to classifying a postal operator as having SMP in a relevant postal services market, the MCA will consult with all the stakeholders involved.¹³ 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.

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 the MCA will remove such a classification if it determines 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 outlined above), or at any other time as market developments may render necessary; or

¹³ 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).

- 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 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.

5. Obligations on Operators with Significant Market Power

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.

5.1 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.

5.2 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.

5.3 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 a position of SMP in a relevant postal services market is required to provide such services in that market also on a standalone basis.

5.4 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.

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.

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.

5.5 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.

5.6 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.

5.7 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.

5.8 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.

5.9 Transitional Provisions - MaltaPost

Any postal service offered by MaltaPost, which falls within the scope of the universal service, will continue to be subject to *ex-ante* tariff regulatory provisions until competition has developed sufficiently in the provision of these services.¹⁴

Upon the publication and bringing into force of the amendments to the Postal Services (General) Regulations (refer to the Consultation) the MCA will classify the incumbent designated USP, MaltaPost, as having SMP in all the relevant postal services markets identified by the MCA.

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. Where the MCA has directed MaltaPost to review a tariff, 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 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 and article 22 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.

¹⁴ Refer to MCA (2011), Regulatory Direction on Specific Aspects of the Universal Postal Service – Decision Notice.