

Please quote our ref: DIS 228
MCA Ref: MCA-LEG/mb/11-0680

15th December 2011

Mr. Kevin Attard
Airspeed Express Limited
230, Ninu Cremona Street
Paola PLA 1000

Dear Mr Attard

**Subject: Final decision following a complaint by MaltaPost Plc against Global
Parcels Limited, General Logistics Services and Airspeed Express Limited**

1. Introduction

1.1 MaltaPost plc [hereinafter "MaltaPost"] filed a complaint as per a letter dated 18th August 2011 against Global Parcels Limited [GPL], General Logistics Services [GLS] and Airspeed Express Limited [AEL] alleging that these entities are providing illicit postal services either because they do not have an authorisation to do so or because they do have the requisite type of authorisation [namely an individual licence to provide postal services which are not reserved but which are both within and outside the scope of the universal service].

1.2 In support of its complaint MaltaPost provided photocopies of documentation purporting to demonstrate that one or more of these entities were providing postal services falling within the scope of the universal service and in relation to the provision of which services neither of the said entities had the requisite authorisation in accordance with **regulation 46 of the Postal Services (General) Regulations** [SL 254.01 of the Laws of Malta] [hereinafter "the Postal Regulations"].

1.3 The Malta Communications Authority [hereinafter the "MCA"] provided all the parties complained against with its preliminary findings further to the complaint lodged, inviting the parties complained against to make their final submissions and/or clarifications prior to the taking of a final decision by the MCA.

2. Submissions and the Preliminary Ruling

2.1 MaltaPost on the 18th August 2011 submitted a complaint to the MCA furnishing also a non-confidential version for onward transmission to the entities complained against. Subsequently following a written request by the MCA, MaltaPost wrote to the MCA providing clarifications further to its letter of complaint dated 18th August 2011. Copies of the non-confidential version of the complaint were forwarded by the MCA to the entities complained

against.¹ The entities in question were asked to make their submissions to the MCA further to the complaint made against them.

2.2 In its letter of complaint dated 18th August 2011 MaltaPost alleges that illicit postal operations are being carried by GLS, AEL and GPL. In doing so MaltaPost also referred to activities that it had referred to the MCA on a previous occasion.

2.3 In its complaint MaltaPost, in substance, alleges that the entities complained against are providing postal services in Malta when none of the said entities has an individual licence to do so in accordance with regulation 46 of the Postal Regulations.

2.4 From the records held by the MCA it results that none of the entities complained against has an individual licence authorising it to provide postal services which are not reserved but which fall within the scope of the universal service. Factually it results that two of the said entities - namely GPL and AEL - each have a general authorisation to provide non-reserved postal services that are outside the scope of the universal service, whereas the third entity complained against, namely GLS, whilst not having any type of authorisation to provide postal services in Malta, conducts its operations and is represented in Malta by GPL. In this regard Mr. Pierre Attard on behalf of GPL as per GPL's communication dated 13th September 2011 informed MCA that GPL is the contracted GLS network operator in Malta and that GPL is handling the aforesaid complaint made by MaltaPost against GLS until it is resolved.²

2.5 Mr. Kevin Attard on behalf of AEL replied that all the services provided by AEL are "fully covered by the general authorisation issued to it by the MCA". AEL noted that accordingly MaltaPost's allegations against it are "unfounded and irrelevant". AEL further noted that it has no commercial relationship with GLS as alleged by MaltaPost.³

2.6 With regard to the nature of the postal services provided by GPL whether on its own behalf or as the contracting representative of GLS in Malta, GPL stated in its submissions to the MCA that:

"As you can see we operate in exactly the same environment, with same characteristics, of any express operator. In our application⁴ to MCA we had described

¹ With regard to the complaint against GLS the said complaint was forwarded to Mr. Pierre Attard acting obo GPL.

² See also e-mail dated 6 September 2011 sent by Mr. Pierre Attard obo GPL informing MCA that GPL is the network partner which represents GLS in Malta and letter dated 6 September 2011 by MCA to Mr. Pierre Attard whereby Mr. Attard was informed that unless advised to the contrary, the MCA would proceed on the basis that GLS are in Malta represented by GPL.

³ See letter dated 6 September 2011 by Mr. Kevin Attard for AEL. This was reaffirmed by AEL in a subsequent submission dated 18 November 2011.

⁴ GPL refers to its "application". Factually this however was a notification for a general authorisation in accordance with regulation 48 of the Postal Regulations. References in this context to "application" or "applied" should therefore be construed as referring to "notification" or "notified" in accordance with the aforesaid regulation 48.

our services as **non express deferred services**. The only difference between our services and that of an express operator is that **the outbound service is not a next day delivery service into capital and major cities and post codes in Europe**. This is due to the fact that our operational connection to our principal utilises air freight as opposed to the extremely costly transport mode adopted by express operators. We have opted to be more transparent with our customers **by marketing the service as non express services to highlight the fact that it is not a next business day delivery service.**⁵ [bold print is of the MCA].

2.7 In its subsequent written submissions⁶ in response to MaltaPost's complaint, GPL on the use of the phrase "non express deferred" services, raises some points. In the first instance GPL remarks that when it notified the MCA with a general authorisation to enable GPL to provide postal services, at that stage there was no definition of an express service whether at law or by the MCA. GPL explains that the use of the phrase "non express deferred" was used so as to differentiate GPL from other operators in the same line of business and so as "not to mislead customers into thinking that the transit time into Europe was identical" to that of other operators. GPL further state that if it had to "apply"⁷ today for a general authorisation then it would "apply" as an "express operator" as defined in Decision Number 4 of the MCA Decision of the 25 March 2011.

2.8 GPL is correct in saying that when it notified for a general authorisation, the MCA had not yet published its decision defining what constitutes "express service". This however does not preclude the applicability of what was determined by the MCA in its regulatory decision of the 25th March 2011 entitled "Regulatory Direction on Specific Aspects of the Universal Postal Service – Overview of Responses to Consultation and Decision Notice" [hereinafter "the 25th March 2011 Decision"].

Reference in particular is made to Decision number 4 of the aforesaid decision under the subheading "Express Mail service" whereby the MCA elaborates on what it considers to constitute an "express mail service", describing such services as consisting "of the faster and more reliable acceptance/collection, handling, transportation and distribution of postal articles when compared to that of the fastest standard category of the basic universal postal service". Moreover in the case of inbound cross-border express mail services such articles must be "delivered within 24 hours after arrival in Malta."⁸ In the same decision the MCA further lists a series of what it describes as "supplementary characteristics" of an express mail services, namely that such a service must:

⁵ Comments by GPL in its letter dated 3rd June 2011 in response to the MCA's letter dated 12th May 2011. In its letter of the 12th May 2011 the MCA had queried with GPL about the nature of its "non-express deferred" services.

⁶ See submissions by GPL dated 29 September 2011, page 1 thereof.

⁷ See above footnote 4.

⁸ See page 30 of the MCA decision of the 25 March 2011.

- “ be clearly identified by the postal operator as an express postal service from acceptance to delivery (i.e. it is the clear intention of the sender that the postal article is sent via an express mail service);
- have the express characteristic of the service throughout the supply of the service (from acceptance to delivery), clearly established in the terms and conditions of the service;
- have a guaranteed pre-set delivery time as agreed between the express mail service provider and the sender of the postal article;
- include priority handling, tracking and managerial control throughout the supply of the service (i.e. from acceptance to delivery);
- allow end-to-end tracking of the postal article by the sender and receiver from acceptance to delivery;
- upon delivery of each express mail item, the postal operator must obtain written acknowledgement of delivery from the person receiving the express mail item; and
- have additional value-added features over the services falling within the scope of the universal service involving, amongst others, the possibility of a premium price for a better quality of service.”.

2.9 It is pertinent to note that this decision was effective as on the 25th March 2011 and that no one contested the contents of the said decision.

2.10 In examining the nature of the services provided by GPL and/or GLS it is therefore imperative that one considers such services in the light of what was decided as per the 25th March 2011 Decision.

2.11 MCA considers that the main issue relates as to whether the postal services in question provided by GPL and/or by GPL on behalf of GLS factually fall within the scope of the universal service and therefore necessitate an individual licence in accordance with article 46 of the Postal Regulations.

2.12 In its preliminary findings the MCA provided as follows namely that:

- *Prima facie* it does not result that there is enough tangible evidence to demonstrate that AEL is providing postal services on behalf of GLS which services fall within the scope of the universal service;
- GLS does not require an authorisation provided that GPL has the requisite authorisation, this on the basis that GPL stated that in Malta it was providing postal services for and on behalf of GLS; and
- *Prima facie* GPL is providing postal services which fall within the scope of the universal service and therefore consequently an individual authorisation is required.

3. Submissions subsequent to the MCA's preliminary ruling

3.1 AEL in its response to the MCA's preliminary findings reconfirmed that it does not have and never had any contractual relationship with GLS.

3.2 GPL in its response to the MCA's preliminary findings focused on the difference which – according to GPL – exists between MaltaPost's parcel indicated time-frames of outbound post delivery from keep-up in Malta to delivery to the country of destination, contending that the transit times achieved by GPL are below the minimum timeframes mentioned by MaltaPost. GPL also noted that MaltaPost's EMS international courier service guaranteed delivery times had been suspended by MaltaPost.

3.3 GPL with regard to its inbound parcel delivery post again contends that factually it is much faster than MaltaPost's parcel post services even though it has no figures relating to MaltaPost's inbound parcel post services. GPL also noted that other companies such as DHL and UPS, who also provide express services, do not provide details of transit times or delivery commitments in their respective terms and conditions.

4. Decision

The position of AEL

4.1 MaltaPost in its letter of complaint contends that AEL operates for GLS in Malta. In support of this contention MaltaPost stated that a particular postal parcel was delivered in Malta by AEL after it was shifted to a different network presumably that of GLS. MaltaPost also presented a failed notice of delivery by AEL as documentary evidence of failed attempts by AEL to deliver the said postal item.

4.2 AEL when confronted with MaltaPost's claim categorically stated that it has no commercial relationship with GLS. AEL further remarked that it has a general authorisation to provide postal services.⁹ It does not appear that there is enough tangible evidence to

demonstrate that AEL is providing postal services on behalf of GLS which fall within the scope of the universal service. This is being stated without prejudice to any further MCA investigations on the matter if it results that there is sufficient documentary evidence to give comfort to MaltaPost's allegations.

Does GLS require an authorisation to provide postal services in Malta?

⁹ That is a general authorisation in accordance with regulation 47 of the Postal Regulations to provide postal services outside the scope of the universal service.

4.3 It is important to establish in the first instance the position of GLS, specifically what type of authorisation, if any, is required by this entity, namely whether it requires an individual licence in accordance with regulation 46 of the Postal Regulations or else a general authorisation in accordance with regulation 47 of the Postal Regulations?

4.4 From the facts made known to the MCA, it results that in Malta GPL represents and acts on behalf of GLS. The MCA therefore considers that in the circumstances, if GPL has the requisite authorisation to undertake the provision of postal services in Malta, then there is no need for GLS to acquire a similar authorisation, this always with the clear understanding that the provision of such services is directly undertaken and performed by GPL on behalf of GLS. The issue therefore is for the MCA to determine whether it suffices for GPL to have a general authorisation in accordance with regulation 47 of the Postal Regulations, or conversely whether the services or part of the services being provided by GPL necessitate an individual licence in accordance with regulation 46 of the Postal Regulations.

The position of GPL and GLS

4.5 The MCA notes that unlike AEL, GPL represents and directly acts for GLS in Malta. The issue here is therefore to determine whether GPL, as a result of its representation of GLS in Malta or otherwise, is factually providing postal services which fall within the scope of the universal service, or conversely whether the postal services provided fall outside the scope of the universal service and therefore a general authorisation would suffice.

4.6 GPL states that it cannot give "delivery commitments" or transit times in its standard terms and conditions, this in clear contrast to the characteristics of an express service as stated in the MCA's Decision Number 4 of the 25th March 2011 Decision. By GPL's own admission its postal services do not have, amongst other characteristics, a guaranteed pre-set delivery time agreed between the service provider and the sender of the postal article. GPL in support of its position claims that MaltaPost's own EMS international courier services does not currently offer guaranteed delivery times. It should however be noted that the said guaranteed delivery times have been suspended by MaltaPost's because of what MaltaPost's describes as "international security purposes".

4.7 Even if for the sake of argument MaltaPost is without any valid reason failing to provide guaranteed delivery times in relation to its own express services, this alleged shortcoming on the part of MaltaPost does not signify that GPL is consequently entitled to consider its postal services as automatically being express services. Furthermore, either characterisation of Maltapost's EMS service becomes inconsequential within the context of whether an individual licence is required or not, since Maltapost in actual fact holds a licence to provide services both within, and outside, the scope of the universal services.

Without prejudice to the above, the MCA requested Maltapost to provide explanations with respect to the suspension of guaranteed delivery times in relation to its EMS services. In its response Maltapost confirmed that the suspension did not apply to the delivery of inbound postal articles following arrival in Malta, and that in the case of outgoing items these would still be covered up to €3,500 in case of loss or damage, which compensation does not feature in the case of other postal services as specified in their respective terms and conditions.

4.8 GPL's allegation that other companies who also provide express services (as per para 3.3 of this decision) such as DHL and UPS do not provide details of transit times or delivery commitments in their respective terms and conditions, is in contradiction to its earlier representation that GPL had initially described its service as a "non-express deferred service" to differentiate it from the service provided by other express operators (see above para 2.6).

4.9 The MCA considers that GPL fails in at least three important aspects which characterises express postal service, namely that it:

- (a) does not provide guaranteed delivery times both with regard to its inbound and outbound mail services;
- (b) does not ensure delivery within 24 hours after arrival in Malta; and
- (c) does not provide for other additional value added services over the services falling within the scope of the universal service (apart from the possibility of changing the destination and address in transit which GPL claims to be catered for).

Based on the description given by GPL of the characteristics of the specific services it provides, such services cannot be considered as an express postal service falling outside the scope of the universal postal services.

4.10 In line with Decision 1 of the 25th March 2011 Decision, in particular and not limited to paragraph (3) of the aforesaid Decision 1, and based on the information provided, the MCA considers that the service provided is of a kind that, from the point of view of users of

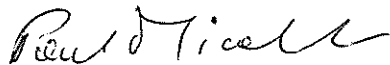
postal services, could reasonably be said to be interchangeable with a service that falls within the description of a service forming part of the universal postal service.¹⁰ Consequently an individual licence in accordance with article 8(1)(a)(ii) of the Postal Services Act [Cap. 254 of the Laws of Malta] and with regulation 46 of the Postal Regulations, is required in order to provide such services.

¹⁰ In line with the EU Postal Services Directive **2008/6/EC** (Recital27) Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.

4.11 The MCA after having considered its regulatory decision of the 25th March 2011 as referred to above and the various submissions made by all concerned parties, is hereby deciding that the postal services as described in GPL's submissions fall within the scope of the universal service and therefore necessitate an individual licence in order to provide postal services which fall within the scope of the universal service.

Requirement on GPL to apply for an individual licence

4.12 In view of the above GPL is required **within forty days commencing from the date of this decision to apply for the issuing of an individual licence to provide postal services which are not reserved but fall within the scope of the universal services.** The MCA reserves the right after the lapse of the aforesaid period to take the appropriate regulatory measures which may include the imposition of administrative fines whether on a daily basis and/or on a one off basis.



Paul Edgar Micallef
Chief Legal Adviser

Cc: Dr. Aaron Zammit Apap, Head Legal & International Relations MaltaPost Plc.