

Court of Appeal

(Inferior Jurisdiction)

Application number 217/2012

**DHL International Limited (C6576) (applicant)**

**Vs**

**Malta Communications Authority (respondent)**

30<sup>th</sup> January, 2017.

Applicant company appealed from the judgment delivered by the Administrative Review Tribunal on the 8<sup>th</sup> January, 2014 whereby the appellant DHL International Limited submitted that:

*The Tribunal, after having taken cognisance of the application filed by DHL International Limited on the 23<sup>rd</sup> February 2011 before the Communications Appeals Board, subsequently transferred before this Tribunal, by means of which it requests that the decision given by the Malta Communications Authority and communicated to it by letter dated 15<sup>th</sup> February 2011 be cancelled and revoked and that consequently the obligation imposed on it by the Authority to operate the service provided by it for Deutsche Post under an individual licence be cancelled and thus be allowed to operate the said service under the Universal Service without an individual licence, with costs against the Malta Communications Authority;*

*That the requests put forth by the said Company be rejected, with costs against it, since: (i) the service provided and rendered by the Applicant Company for Deutsch Post is not an express mail service but a standard or normal postal service which service falls under the category of non-reserved services but which are within the scope of the Universal Service and thus the postal operator requires an individual licence to provide and render such a service; and since (ii) the requests as put forth by the Applicant Company, where on the one hand it requests for it to be allowed to provide and render the said service under the Universal Service with an individual licence, are conflicting and consequently null;*

*In the decision of The Administrative Review Tribunal decided by Magistrate Dr. Gabriella Vella during the sitting of the 8<sup>th</sup> January, 2014, it was decided the following:*

*Once the service provided and rendered by the Applicant Company for Deutsche Post is not and cannot be considered to be an express mail service but is a service which falls under the scope of the Universal Service as defined under Section 17(4) of Chapter 254 of the Laws of Malta, in terms of Sections 7, 8(1)(a)(ii) and the same Section 17(4)(b) of Chapter 254 of the Laws of Malta and Regulation 46 of Subsidiary Legislation 254.01, that service must be provided and rendered under an individual licence duly issued by the Malta Communications Authority.*

*Therefore, the reading and consequent application of the Law by the Respondent Authority in so far as concerns the nature of the service provided and rendered by the Applicant Company for Deutsche Post was and remains correct and consequently the Applicant Company must provide and render such a service under an individual licence as provided for the by the Law.*

*For the said reasons the Tribunal rejects the Appeal lodged by the Applicant company from the decision of the Respondent Authority communicated to it by letter dated 15<sup>th</sup> February 2011, and confirms the said decision. Costs pertinent to these proceedings are to be borne by the Applicant Company.*

*That DHL International Limited felt aggrieved with this decision and is humbly submitting the following appeal. That the aggravation [recte: grievance] is clear and manifest and consists of the following:*

- 1. The main issue is the definition of an express service and it is being humbly submitted that the first court was incorrect at arriving at its conclusion.*
- 2. As evidenced by Charles Schiavone in his evidence DHL International Limited provided an express service to Deutsche Post in Germany on their specific instructions. In fact parcels sent to Malta are given a DHL express label which can be checked and traceable and trackable on the on-line system. Furthermore the witness declared that the order for an express service emanates from Deutsche Post as they are their clients and they get paid from the same Deutsche Post. With all due respect the witness from the Malta communications Authority Mr. Daman Gatt was incorrect in arriving at his conclusions that the express services are deemed not to be interchangeable with the basic set of Universal Services. His evidence was limited to an end to end user and cross border end to end service. In his case the legal framework is not the end to end user but Deutsche Post to DHL International Limited the express courier in Malta. This is where legally there is the difference in what the MCA is saying and what DHL Malta is submitting. DHL International Limited or DHL: Malta as is more commonly known has no legal relationship with the German user but with Deutsche Post. His legal obligation is with Deutsche Post and he is engaged to carry on the service by Deutsche Post therefore there is no issue of inter-changeability but a specific service which falls under article 174(b) of Chapter 254. One cannot assume that the legal relationship is between the German user and DHL (Malta).*
- 3. Without prejudice to the above, the company DHL International Limited is reserving from now the right to ask for a reference to the European Court of Justice on the interpretation given by the Administrative Review Tribunal on the interpretation of Recital 18 of Directive 97/67/EC of the European Parliament and the Council of the 15<sup>th</sup> December 1997 on common rules for development of the internal market of Community Postal Services and the improvement of quality of service.*
- 4. The conclusion given by the Administrative Review Tribunal is incorrect when it concluded that the parcel sent by express delivery without the sender's acknowledgement cannot be rendered that of an express mail service as is the case. The argument that a postal service can be considered at local and European level only if it is an end-to-end express postal service from its origin to ultimate delivery and any other form cannot be considered to be such, is totally incorrect. The counter arguments is that the client is Deutsche Post who engages DHL Malta and they ask for the service making it in itself a request for express delivery. One therefore cannot say that it is not an express service.*
- 5. Following this point, also the conclusion that Deutsche Post originating parcels are not treated in the same way as DHL: worldwide origination parcels thus they are not express delivery parcels as intended by law is totally incorrect.*
- 6. In the first place all postal articles are delivered within two working days as that is the obligation imposed on a service provided for express mail or parcels. The fact that these parcels are singled out is to distinguish them from other parcels that are already within the system of DHL worldwide express and parcels sent by Deutsche Post are thus singled out and specifically rendered into an express service which puts a delay on the system for a few hours but are delivered with the stipulated time frame imposed by law. Therefore the conclusion reached by the first Tribunal is incorrect. As the parcels are treated in the same way and in effect given the same treatment.*
- 7. The Administrative Tribunal was incorrect in its conclusion that the Deutsche Post system and the DHL International Limited systems are incompatible. The German user can keep tracking the parcel only by the German number even when the parcel is in Malta. DHL Malta invested in a system that the tracking number although different works on an interchangeable system which thus renders the system compatible with the German tracking number only. Having*

*said this this is also irrelevant as deutsche Post can always check the tracking number and find out where the parcel is.*

8. *Furthermore the service provided by DHL Malta for Deutsche Post is an express service as it has all the qualities of an express service which include fast delivery, tracking services and other aspects which are not preformed or required for a normal postal service."*

The respondent filed a reply on the 17<sup>th</sup> February wherein it gave reasons why the appeal should be rejected.

In the judgment the Tribunal stated:

*"Therefore even though the Applicant Company only delivers parcels originating from Deutsche Post it is still rendering a postal service which entails the clearance, sorting, transport and distribution of postal articles, which service in reality is not an express mail service, since, amongst other things, it lacks the main characteristic which renders it as such, that is the specific intention of the sender that his parcel be delivered by express mail service, but is a service which falls under the scope of the Universal Service since it is ultimately interchangeable and substitutable to a Universal service.*

*Once the service provided and rendered by the Applicant Company for Deutsche Post is not and cannot be considered to be an express mail service but is a service which falls under the scope of the Universal Service as defined under Section 17(4) of Chapter 254 of the Laws of Malta, in terms of Section 7,8(1)(a)(ii) and the same Section 17(4)(b) of Chapter 254 of the Laws of Malta and Regulation 46 of Subsidiary Legislation 254.01, that service must be provided and rendered under an individual licence duly issued by the Malta Communication Authority.*

*Therefore, the reading and consequent application of the Law by the Respondent Authority in so far as concerns the nature of the service provided and rendered by the Applicant Company for Deutsche Post was and remains correct and consequently the Applicant Company must provide and render such a service under an individual licence as provided for by the Law.*

*For the said reasons the Tribunal rejects the Appeal lodged by the Applicant Company from the decision of the Respondent Authority communicated to it by letter dated 15<sup>th</sup> February 2011, and confirms the said decision. Costs pertinent to these proceedings are to be borne by the Applicant Company".*

### **Considers,**

1. On the 20<sup>th</sup> October 2005, respondent received a "Notification Form For General Authorisation" filed by the applicant. The applicant was providing **express service** under this general authorization license.
2. Applicant applied for the grant of a license to provide postal services which are not reserved but which fall within the scope of universal services. On the 4<sup>rd</sup> February, 2010 applicant was granted a licence "*to provide non-reserved postal services **within the scope of universal services***", for a period of ten (10) years with effect from the 3<sup>rd</sup> February, 2010.
3. After the issue of the license for non-reserved postal services, the applicant claimed that no such license was required for the services provided for Deutsche Post, as the service rendered is not considered to fall within the scope of Universal Services (letter dated 21<sup>st</sup> January, 2011). The respondent did not agree (letter dated 15<sup>th</sup> February 2011), and claimed: "... MCA

*considers that the service that is being provided by DHL Malta, following Deutsche Post Germany's (Deutsche Post) 2010 decision not to continue using MaltaPost plc for the final delivery of their outgoing parcel post deliveries to Malta, **is a separate and distinct service from the express services currently provided by DHL Malta under a general authorisation.** The MCA therefore considers that the aforesaid postal service does not qualify as an express service but falls within the scope of the universal service".*

4. Applicant contends that the service it is giving Deutsche Post is an express service, which can be granted under the General Authorisation. This upon the arrival of the parcel in Malta. Applicant's client is Deutsche Post and it is given an express service, which include fast delivery, tracking services and other aspects which are not performed or required for a normal postal service. The respondent contends that the nature of the service depends on what the sender requests.
5. There is a distinction between **express services** and **universal postal service**. Directive 97/67/EC provides in recital 18:

*"Whereas, in view of the fact that the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the **extra price that customers are prepared to pay**, without prejudice, however, to the price limit of the reserved area which must be respected".*

6. In 1998 European Commission notice, express mail service was described as a:

*"service featuring, in addition to greater speed and reliability in the collection, distribution, and, delivery of items, all or some of the following supplementary facilities guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and address in transit; confirmation of sender of receipt of the item dispatched; monitoring and tracking of items dispatched; **personalised service for customers and provision of an a la carte service, as and when require. Customers are in principle prepared to pay a higher price for this service**".*

7. According to regulation 16 of the *Postal Services (General) Regulations* (Subsidiary Legislation 254.01):

*"wherein an incoming postal article bears an express delivery label or is conspicuously marked with the words Express Delivery or with such other words so as to indicate **the intention of the sender** that the postal article be delivered by express delivery, the universal service provider or providers as the case may be shall deliver the postal article as soon as possible and in any case not later than two working days from its arrival in Malta".*

8. According to article 2 of the Postal Services Act (Chapter 254), "sender means a legal or natural person responsible for **originating postal article**". This

definition is a reproduction of what is stated in article 2(16) of the EC Directive 97/67 of 15 December 1997.

9. Deutsche Post is not the sender of the postal article. The sender is the customer of Deutsche Post. It is not contested that the sender is not asking for express delivery. In fact when the parcel departs from place of origin, no express delivery label is affixed. Charles Schiavone said, *"Yes. As soon as they come here we issue another label and name them express"*. The fact that Deutsche Post is making use of the services of applicant company for the delivery of the postal article to the addressee, does not render Deutsche Post as the sender. The German company is not the person that originates the postal article. The Court agrees with the Tribunal, that *"... A postal service can be considered to be an express mail service as defined under Postal Legislation, both at local and European level, only if it is an end-to-end postal service that is from origin to ultimate delivery, and any other form of service cannot be considered to be such"*. Therefore, taking into consideration what was stated in paragraphs 5-8 of this judgment, the postal articles cannot be classified as **express mail in terms of law**.

**For these reasons the Court rejects the appeal. All costs are at the charge of the applicant company.**

Anthony Ellul.