



## **THE ADMINISTRATIVE REVIEW TRIBUNAL**

**MAGISTRATE DR.  
GABRIELLA VELLA**

Sitting of the 8 th January, 2014

Rikors Number. 217/2012

**DHL International Limited**

**Vs**

**Malta Communications Authority**

**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;

After having taken cognisance of the documents submitted by the Applicant Company together with its Application marked Dok. "1" to Dok. "3" at folio 14 to 1 of the records of the proceedings;

After having taken cognisance of the Reply by the Malta Communications Authority by means of which it contests the Appeal lodged by the Applicant Company and pleads 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 Deutsche 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 the cancellation of the obligation imposed on it to operate the service provided and rendered for Deutsche Post under an individual licence and on the other 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;

After having taken cognisance of the documents submitted by the Respondent Authority together with its Reply marked as Dok. "MCA1" to Dok. "MCA7" at folio 42 to 18 of the records of the proceedings;

After having taken cognisance of the Decree by the Communications Appeals Board dated 28<sup>th</sup> July 2011 by virtue of which the Board authorised a correction to the requests put forth by the Applicant Company in its Application, the sense that the words "with an individual" be cancelled and replaced with the words "without an individual" so that now the final request put forth by the Applicant Company reads "be allowed to operate the service provided and rendered for Deutsche Post under the Universal Service without an individual licence";

After having taken cognisance of the additional Reply submitted by the Respondent Authority following the correction authorised by the Decree dated 28<sup>th</sup> July 2011, by virtue of which it reiterates its objections to the requests put forth by the Applicant Company on the grounds that the said Company cannot be allowed to operate within the ambit of the Universal Service without an individual licence since this licence is effectively required by law when a postal operator is rendering a service which is not a reserved service but falls within the scope of the Universal Service as defined under Section 17(4) of Chapter 254 of the Laws of Malta, and this in terms of Sections 7 and 8 of Chapter 254 of the Laws of Malta and Regulations 44 to 50 of the Postal Services (General) Regulations, Subsidiary Legislation 254.01;

After having taken cognisance of the testimony given before the Communications Appeals Board by: (a) Charles Schiavone, a Manager with the Applicant Company, during the sittings held on the 18<sup>th</sup> November 2011<sup>1</sup> and the 16<sup>th</sup> February 2012<sup>2</sup>; (b) Dr. Paul Micallef<sup>3</sup>, legal representative for the Respondent Authority, and Mr. Damian Gatt<sup>4</sup>, a representative of the Respondent Authority, during the sitting held on the 25<sup>th</sup> November 2011; (c) Ian Agius, Chief of Operations with the Respondent Authority, during the sitting held on the 12<sup>th</sup> January 2012<sup>5</sup>;

After having taken cognisance of documents submitted before the Communications Appeals Board by: (a) Charles Schiavone during the sitting held on the 18<sup>th</sup> November 2011<sup>6</sup> and by means of an e-mail dated 21<sup>st</sup> November 2011<sup>7</sup>, (b) the Applicant Company during the sitting held on the 25<sup>th</sup> November 2011<sup>8</sup>; (c) the Respondent Authority by means of a Note filed on the 29<sup>th</sup>

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<sup>1</sup> Folio 115 to 113 of the records of the proceedings.

<sup>2</sup> Folio 247 and 246 of the records of the proceedings.

<sup>3</sup> Folio 159 to 157 of the records of the proceedings.

<sup>4</sup> Folio 157 and 156 of the records of the proceedings.

<sup>5</sup> Folio 174 and 173 of the records of the proceedings.

<sup>6</sup> Folio 99 to 96 of the records of the proceedings.

<sup>7</sup> Folio 127 to 119 of the records of the proceedings.

<sup>8</sup> Dok. "XXX2" a folio 134 of the records of the proceedings.

November 2011 marked as Dok. “PEM1” to Dok. “PEM5” at folio 145 to 138 of the records of the proceedings, by means of a Note filed on the 13<sup>th</sup> February 2012 marked as Dok. “PEM6” to Dok. “PEM9” at folio 221 to 181 of the records of the proceedings and by means a Note filed on the 16<sup>th</sup> February 2012 marked as Dok. “PEM10” to Dok. “PEM12” at folio 236 to 223 of the records of the proceedings; and by (d) the Respondent Authority during the sitting held on the 16<sup>th</sup> February 2012 marked as Dok. “PMG1” at folio 239 to 237 of the records of the proceedings;

After having taken cognisance of the Decree delivered by the Tribunal on the 27<sup>th</sup> September 2012, by means of which it confirmed that Dok. “PEM9” submitted by the Respondent Authority is to continue forming part of the records of these proceedings;

After having heard testimony given by Darren Micallef<sup>9</sup> and Charles Schiavone<sup>10</sup> during the sitting held on the 7<sup>th</sup> February 2013, by Joseph Gafà during the sitting held on the 5<sup>th</sup> March 2013<sup>11</sup> and by Damian Gatt during the sittings held on the 5<sup>th</sup> March 2013<sup>12</sup> and the 30<sup>th</sup> April 2013<sup>13</sup>;

After having held an on-site visit at the warehouse of the Applicant Company in Luqa on the 11<sup>th</sup> June 2013 and after having taken cognisance of the minutes pertinent to the said on-site visit<sup>14</sup> and of the document submitted by Charles Schiavone during the said on-site visit;

After having heard oral submissions by the Applicant Company and by the Respondent Authority;

After having taken cognisance of all the records of the proceedings;

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<sup>9</sup> Folio 279 to 276 of the records of the proceedings.

<sup>10</sup> Folio 288 to 280 of the records of the proceedings.

<sup>11</sup> Folio 296 to 290 of the records of the proceedings.

<sup>12</sup> Folio 308 to 297 of the records of the proceedings.

<sup>13</sup> Folio 313 to 310 of the records of the proceedings.

<sup>14</sup> Folio 317 to 315 of the records of the proceedings.

**Considers:**

By means of a letter dated 15<sup>th</sup> February 2011<sup>15</sup> the Respondent Authority informed the Applicant Company that *this standard postal service being offered by DHL Malta [for Deutsche Post], in view of the above, is considered to be one that is substitutable to and interchangeable with the universal services and as such falls within the scope of the universal service. More specifically such a service is seen as being substitutable and interchangeable with the universal service as described under the provision of article 17(4)(b) of the Postal Services Act, Chapter 254 of the Laws of Malta. Consequently DHL Malta requires an individual licence as stipulated under article 8(1)(a)(ii) of Postal Services Act, Chapter 254 of the Laws of Malta in order to provide postal services which are standard postal services. DHL Malta may wish to note that the provision of such postal services without the required individual licence as referred to above will lead to the initiation of the appropriate regulatory measures by MCA. Such action will be without prejudice to any other measures as the MCA may consider necessary in the circumstances.*

The Applicant Company felt aggrieved by this decision and lodged an appeal there from requesting: (a) the revocation and cancellation of the said decision; (b) the consequent cancellation of the obligation imposed on it to operate the service it provides and renders for Deutsche Post under an individual licence; and (c) to be allowed to operate the said service under the Universal Service without an individual licence. The Applicant Company founds its appeal on the ground that the service it provides and renders for Deutsche Post is an express mail service and therefore does not fall under the category of the Universal Services which require an individual licence but can be provided and rendered under a General Authorisation, which Authorisation is already in its possession. In support of its ground for appeal the Applicant Company argues that: (i) an express mail

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<sup>15</sup> Dok. "1" at folio 14 to 12 of the records of the proceedings.

service as defined by the European Commission in its 1998 “Notice on the application of the competition rules to the postal sector” is distinct from a Universal Service and can therefore be rendered without the need of an individual licence; and that (ii) once it provides and renders an express mail service upon instructions by its client Deutsche Post, which service falls within the ambit of its normal enterprise, it does not require an individual licence but can continue operating and rendering such a service under its General Authorisation.

The Respondent Authority objects to and opposes the requests put forth by the Applicant Company on the basis that the service the said Company provides and renders for Deutsche Post is not an express mail service as claimed by it but is a standard or normal postal service, which service falls under the category of non-reserved services which fall within the scope of the Universal Service and thus requires an individual licence to be provided rendered<sup>16</sup>. It further argues that the Applicant Company cannot be allowed to operate within the ambit of the Universal Service without an individual licence since this licence is effectively required by law when a postal operator is rendering a service which is not a reserved service but falls within the scope of the Universal Service as defined under Section 17(4) of Chapter 254 of the Laws of Malta, and this in terms of Sections 7 and 8 of the Postal Services Act, Chapter 254 of the Laws of Malta, and Regulations 44 to 50 of the Postal Services (General) Regulations, Subsidiary Legislation 254.01<sup>17</sup>.

In its original Reply the Respondent Authority also claimed that the requests put forth by the Applicant are contradictory to each other and consequently null since it cannot on the one hand request the cancellation of the obligation imposed on it to operate the service provided and rendered for Deutsche Post under an individual licence and on the other hand request to be allowed to operate within the ambit of the Universal Service with an individual licence. This particular issue has however been

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<sup>16</sup> Plea raised in the original Reply filed by the Respondent Authority.

<sup>17</sup> Plea raised in the additional Reply filed by the Respondent Authority.

superseded by means of a Decree delivered by the Communications Appeals Board on the 28<sup>th</sup> July 2011 which authorised a correction to the requests put forth by the Applicant Company in its Application to the effect that the words “with an individual” be cancelled and substituted with the words “without an individual” so that the relative request now reads “be allowed to operate the service provided and rendered for Deutsche Post under the Universal Service without an individual licence”.

From evidence submitted by the parties the following undisputed facts result:

- The Applicant Company has been operating in Malta for a number of years and up until recently provided trans-border movement of documents and goods exclusively via express mail services;
- In order to render such services the Applicant Company required and obtained a General Authorisation in terms of Section 8 of the Postal Services Act and Regulation 47 of the Postal Services (General) Regulations<sup>18</sup>;
- In the year 2009 the Applicant Company applied for an individual licence to provide non-reserved postal services within the scope of universal services, which licence was issued on the 4<sup>th</sup> February 2010 for a period of ten years with effect from the 3<sup>rd</sup> February 2010<sup>19</sup>;
- The Applicant Company requested the issue of an individual licence in view of a service it was going to start providing and rendering for Deutsche Post with effect from the year 2010 – more specifically with effect from April 2010 – consisting in the delivery in Malta of parcels originating from Germany;
- After the issue of the said individual licence the Applicant Company requested the Respondent Authority to reconsider its position with regard to the need of such an individual licence for the service provided and rendered for Deutsche Post on the ground that within the European framework with regard to postal services the

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<sup>18</sup> Dok. “3” at folio 5 to 1 of the records of the proceedings.

<sup>19</sup> Dok. “2” at folio 11 to 6 of the records of the proceedings.

service provided and rendered by it for Deutsche Post – which essentially it argues is an express mail service – is not considered to fall within the scope of Universal Services<sup>20</sup>, which request has however be turned down by the Respondent Authority;

- The Applicant Company lodged the present Appeal from the said decision.

The Respondent Authority argues that the Applicant Company cannot now expect to be allowed to operate the service provided and rendered for Deutsche Post without an individual licence, since by asking for the issue of the said licence it itself had acknowledged that it is providing and rendering a service which is not a reserved service but which falls within the scope of the Universal Service. The Applicant Company on the other hand argues that it was the Respondent Authority which directed it to apply for and obtain an individual licence since in the Authority's opinion the service in question is a service which is not a reserved service but falls within the scope of the Universal Service.

In reality the Tribunal does not deem the matter of whom of the two parties requested the issue of or directed the other to obtain an individual licence as central to the merits of this appeal, since either one of the parties, be it the Applicant Company as the requesting party or the Respondent Authority as the directing party, could have read and consequently applied the facts and the applicable legal dispositions in an incorrect manner thus making the ultimate decision for the necessity of an individual licence incorrect. By virtue of these proceedings the Tribunal is being specifically called upon to determine whether or not an individual licence is required by the Applicant Company for it to be able to provide and render the service for Deutsche Post and should the Tribunal conclude that such an individual licence is not needed, it will not and cannot confirm the imposition of such an obligation on the Applicant Company even if it were to accept the argument put forth by the Respondent

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<sup>20</sup> Folio 121 to 119 of the records of the proceedings.

Authority that it was the Applicant Company itself who originally requested the issue of such a licence, since the main function of this Tribunal is to ensure that legal provisions, requirements and obligations are properly, duly and reasonably imposed by the public authorities on private citizens or entities.

From evidence submitted and submissions put forth by the Applicant Company it clearly results that the central argument on which it founds its appeal from the decision of the Respondent Authority is that the service it provides and renders for Deutsche Post is an express mail service and can therefore be provided and rendered under a General Authorisation. The Respondent Authority, whilst agreeing that an express mail service can be provided and rendered under a General Authorization, does not agree that the service provided and rendered by the Applicant Company for Deutsche Post is an express mail service but it argues that it is a standard or normal postal service and consequently cannot be provided and rendered under a General Authorisation but must be provided and rendered under an individual licence.

This in the opinion of the Tribunal forms the core of the merits of this Appeal and its decision must focus on and consequently determine the exact nature of the service provided and rendered by the Applicant Company for Deutsche Post for it to be able to determine under which regime – be it a General Authorisation or an individual licence – such a service can be provided and rendered.

In his testimony before the Communications Appeals Board Charles Schiavone, a Manager with the Applicant Company, explained that *some time ago we had a request from Deutsche Post (DPP) in Germany to operate a service on their behalf. They asked us to provide an express service with their parcels. The services consisted in DPP sending parcels to DHL Malta and DHL Malta will distribute in Malta following the same standards we follow for our own parcels and therefore making no distinction between the principal parcels and those from the German post. ... I explained* [during a meeting held with the

Respondent Authority] *that DPP will be sending parcels not letters, we will receive these with our express material from our own hub in Germany, with the only difference that whereas our material from the hub in Germany will be coming from all over the world, the parcels we will get from DPP will come from Germany only. I told MCA that locally, the parcels from DPP will be distributed in the same as our other material coming from DHL International. ... I explained to the officers from MCA (during an on-site visit held at the Company's warehouse<sup>21</sup>) that each DPP parcel has attached to it a DHL Express Label and that this took place in Malta. This was because the parcels from DPP would be together with the express parcels from DHL. The label contains a bar code with a unique 10 digit number under which can be traceable and trackable in our on-line system. This will allow our customers to trace their parcels. ... The client in Germany is given a DPP number which can be traced in Germany on the DPP website. Since DPP wanted an express service in Malta, upon arrival the parcels are given local DHL express label which can also be traced on the local DHL Malta website. The DPP reference number remains valid and traceable by the client in Germany all the way to delivery even when the parcel is in Malta and there is added to it a DHL Malta label. The reason is because our two systems are linked. We place the DHL tracing number for our own customers in Malta so that they can trace the parcel either on internet or by calling us. ... I wish to add that the 10 digit number given in Malta is also passed on to the customer in Germany. Another reason why we apply a Maltese number is for the courier in Malta so that while using his scanner he will be able to distinguish between parcels originating from DHL or from DPP. ... I confirm that every parcel originating from Germany is stamped by DHL Malta to make sure that all parcels are on the list and we fix a new DHL/DPP label. ... I also showed the how the sorting system was the same as from other parcels coming from DHL. They are mixed together in the courier route after which the particular courier scans all parcels in his bin, prints out a*

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<sup>21</sup> This not being the same on-site visit held by the Tribunal on the 11<sup>th</sup> June 2013.

*list with all DHL/DPP numbers and it is sorted out locally according to his route. In the case of parcels coming from DHL worldwide, and not from DPP, the ten digit number will be fixed already abroad. DPP gives us directions to deliver the parcels by express delivery. DHL Malta had no contact whatsoever with the client sending parcels through DPP. Neither would I know that the client would have indicated that DPP should send the parcel by express service or not. The commercial relationship remains only with Deutsche Post. I get paid for the service from Deutsche Post and not from the client. We do not do normal deliveries for Deutsche Post or anyone else, we only do express delivery. We have never done any ordinary delivery of parcels<sup>22</sup>. In his testimony before the Tribunal upon being asked am I right in suggesting that the Deutsche Post parcel post used to come from abroad not marked as express? Charles Schiavone confirmed that yes, as soon as they come here we issue another label and name them express and upon being asked whilst those coming from other sources used to be marked already as express, he replied Yes. Upon being re-examined, to the question but when your client i.e. Deutsche Post would send packets to Malta, why would you send them express in Malta. Whose decision would it be express? he replied Deutsche Post decision and to the question Deutsche Post. So I understand Deutsche Post will tell you these are express? he replied Yes.*

The Respondent Authority countered this testimony primarily with the testimony given by Damian Gatt and the submission of a number of documents to which Damian Gatt makes reference during his testimony. During his testimony Damian Gatt explained that *the MCA also issued a decision. I can refer to document PAM6 [recte: PEM6]. It issued a decision on the 25<sup>th</sup> March 2011 providing regulatory clarity on the different characteristics between those services which fall within the Universal Service area or within the scope of the Universal Service area and those services falling outside the scope of the Universal Service area. So the question, this is also*

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<sup>22</sup> Testimony given during the sitting held by the Communications Appeals Board on the 18<sup>th</sup> November 2011, folio 115 to 113 of the records of the proceedings.

*referred in our decision how would one distinguish between those services which fall within the scope and outside scope a service falls within the scope of the Universal Service because it displays interchangeability to a sufficient degree from a users perspective to those Universal Postal Services so basically we are talking about ordinary standard letters, standard parcels or standard packet mail so basically those services are interchangeable to a sufficient degree with those Universal Postal Services. These services do not necessarily have to cover all the features of a Universal Postal Service such as daily delivery, daily collection and national coverage. Express services are deemed not to be interchangeable with the basic set of Universal Services because they have amongst others added value features for example it has greater reliability, greater speed and we're talking throughout the service the end to end which means if it's a cross border service we are talking about these added value features from when the sender in country A sends the parcel or a packet to the addressee in country B so it includes fastest reliability than the basic set of Universal Services, more speed, it also has guaranteed preset delivery times and added value features which come at a premium price to the standard type of services. ... Let me first describe what an end to end postal service is so we get an idea of what we're talking about. We're talking about a service and I also quote from document PAM7 [recte: PEM7] which is a study which was carried out on behalf of the Commission which explains what end to end services are, cross border end to end services. A cross border end to end service as even defined by the study and I quote: a customer in country A buys a postal service to convey an item from country A to country B and the service is not provided by the same operator obviously in country B. The postal operator in country A is supplying the collection portion of the end to end service supplied into country B and the postal operator in country B is providing the delivery portion of the same end to end service so we're talking about end to end services from the sender in country A to the addressee indicated on that postal article in country B. ... The operator in Malta if he's delivering postal articles*

*which are being sent from abroad as ordinary parcel post or ordinary letter mail he needs a license because he's operating within the scope of the Universal Service the reason being that it is interchangeable with the Universal Service because the Universal Service provider or the state who designates a Universal Service provider, but he may not need to designate it could be the market which is providing it, is obliged to ensure the delivery of inbound cross border parcels, letters be it registered or un-registered. So because an operator who is also providing the delivery on inbound parcel post services is delivering such items requires a license because basically they're interchangeable with what the Universal Service provision has to provide. So if that operator wasn't operating the Universal Service provider will still have to collect those postal articles and deliver them. ... about express postal articles originating from a sender who decides to enter into an agreement with a postal operator to send his parcel via express additional value added features such as being faster than the normal mail like next day guaranteed delivery, certain time guarantees that it will arrive within two days. ... Those are operating outside the scope of the Universal Service. If he's just providing those type of services he can have a general authorisation but if he's offering them in conjunction with other services to show it in the scope a license is required.*

From the testimony given by Charles Schiavone and the testimony given by Damian Gatt it clearly results that the Applicant Company and the Respondent Authority differ amongst other things on the issue regarding the relationship which effectively gives the postal service its nature as an express mail service or a standard postal service. Whereas the Applicant Company argues that the nature of the service can be determined by the relationship between the postal operators involved in the specific service provided and rendered, the Respondent Authority argues that the nature of the service is determined solely and primarily by the sender, thus making the relationship between the sender and the provider the central element for the determination of the nature of the service.

From a detailed examination of the evidence submitted and submissions put forth by the parties and of the applicable provisions of the Law, namely of the Postal Services Act, Chapter 254 of the Laws of Malta, and the Postal Services (General) Regulations, Subsidiary Legislation 254.01, the Tribunal is of the opinion that the arguments put forth by the Applicant Company in this regard are not legally correct and are therefore unsustainable.

Contrary to that claimed by the Applicant Company the relationship which is central to the Postal Services legislation, both at local and European level, for attributing an express mail service nature as opposed to a universal service nature to the particular postal service provided and rendered, is not the relationship between the postal operators involved in that service but the sender-customer/postal operator relationship. In this regard specific reference is made to: (i) Recital 18 of Directive 97/67/EC of the European Parliament and of the Council of 15<sup>th</sup> December 1997 on common rules for the development of the internal market of Community Postal Services and the improvement of quality of service (1<sup>st</sup> Postal Directive) which provides that *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*; (ii) the 1998 Commission Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services which defines an express mail service 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 à la carte service, as and when required. Customers are in principle prepared to pay a higher price for this service; and (iii) Regulation 16 of the Postal Services (General) Regulations which provides that *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.**

From these principles and legal provisions it is clear that a postal service is and can be considered as an express mail service only if it is the clear intention of the sender that the postal article in question be delivered by express delivery. This therefore means that any instructions for a postal article to be delivered by express delivery given directly by the postal provider who collects the article to the postal provider engaged or sub-contracted by him for the purposes of actual delivery of the same article, as is the case between Deutsche Post and the Applicant Company, without the sender's knowledge, consent or request, does not and cannot render that service an express mail service as provided for in the law.

Apart from the obvious lack of intention on the part of the sender who uses the services of Deutsche Post to have his parcel delivered to Malta by express mail service, so much so that the express delivery label is affixed not at point of origin but only upon arrival in Malta, the Tribunal does not in any way believe that the mere affixing of an express delivery label on the parcel upon its arrival in Malta at the Applicant Company's warehouse is in any way sufficient to change the nature of the postal service from a universal service to an express mail service. As correctly submitted by the Respondent Authority 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 express postal service that is from origin to ultimate delivery, and any other form of service cannot be considered to be such.

In this regard the Applicant Company further argues that even though an express label is affixed on the Deutsche Post parcels only upon their arrival in Malta and not at point of origin as is the case with DHL worldwide originating postal articles, Deutsche Post parcels are not treated any differently from DHL worldwide originating parcels since they consider them to fall under the express delivery service category. The Tribunal once again reiterates that this fact alone, which in reality does not satisfactorily result from the records of the proceedings, is not sufficient to render the service provided and rendered by the Applicant Company with regard to Deutsche Post parcels an express mail service as defined by the law. Even though the Applicant Company claims that it does not make any distinction between the Deutsche Post originating parcels and the DHL worldwide originating postal articles, a totally different scenario has resulted to the Tribunal during the on-site visit held at the Applicant Company's warehouse on the 11<sup>th</sup> June 2013.

During the said visit<sup>23</sup> Charles Schiavone explained to the Tribunal that upon arrival in Malta Deutsche Post originating parcels are sorted and duly labelled with a label issued in Malta by DHL International Limited (that is the Applicant Company) and then they are added to the DHL worldwide originating parcels which arrive in Malta the following day and sent for delivery to the addressee. Upon a specific question by the Tribunal Charles Schiavone confirmed that DHL worldwide originating parcels are sent out for the delivery on the same day of arrival to Malta. All parcels arrive in Malta at around 9:00a.m., they are sorted out by 11:00a.m. and DHL worldwide originating parcels are sent out for delivery on that same day, whereas Deutsche Post parcels are retained by the Applicant Company until they are duly

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<sup>23</sup> Vide minutes of the on-site visit held by the Tribunal on the 11<sup>th</sup> June 2013, at folio 317 to 315 of the records of the proceedings.

labelled and then sent out for delivery on the following day. Therefore contrary to that claimed by the Applicant Company, Deutsche Post originating parcels are not treated in the same way as DHL worldwide originating parcels and this for the very obvious reason that in reality Deutsche Post originating parcels are not express delivery parcels as intended by law.

Another fact which resulted during the on-site visit and which clearly shows that the service provided and rendered by the Applicant Company for Deutsche Post is not an express mail service is the possibility of tracking the said parcel by the sender. Whereas DHL worldwide originating parcels, where the service is an actual end-to-end express service, can be tracked by the sender via the DHL website up until actual delivery of the parcel, the same cannot be said for Deutsche Post originating parcels. Charles Schiavone in fact explained that in so far as concerns the tracking of the parcels the Deutsche Post system and the DHL International system are not compatible and therefore the parcel cannot be tracked as to its actual and final delivery by the sender on the Deutsche Post system by using the tracking number allocated to it at origin or the tracking number allocated it upon arrival in Malta. The tracking of the parcel is only possible for the addressee in Malta via the DHL website since the ultimate number allocated to the parcel is issued by the Applicant Company. The Applicant Company seeks to mitigate this deficiency by sending on a daily basis to Deutsche Post a file containing delivery data regarding its parcels so that should the sender seek information regarding his parcel he can be given such information. The Tribunal however is not of the opinion that this particular measure can in any way indicate that the service provided and rendered by the Applicant Company for Deutsche Post is an express mail service as defined by the law.

The Tribunal further notes that in substantiating its claim that the service provided and rendered by it for Deutsche Post cannot be categorised as a universal service, the Applicant Company emphasises that it only delivers

parcels and not any other form of mail for Deutsche Post. The Tribunal however does not deem such a submission to be in any relevant to the claim being put forth by the Applicant Company since the law in so far as concerns the requirement of authorisation for postal services<sup>24</sup> and in so far as concerns the definition of universal service<sup>25</sup> clearly refers to postal services which are defined as *services involving the clearance, sorting, transport and distribution of postal articles*<sup>26</sup>, where postal article means *an article addressed in the final form in which it is to be carried by a postal operator. In addition to articles of correspondence, such articles also include books, catalogues, newspapers, periodicals and postal parcels, however so described, including packages containing merchandise with or without commercial value.*

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 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.

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<sup>24</sup> Section 7 and 8 of Chapter 254 of the Laws of Malta.

<sup>25</sup> Sections 7, 8 and 17(4) of Chapter 254 of the Laws of Malta.

<sup>26</sup> Section 2 of Chapter 254 of the Laws of Malta.

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.

**< Final Judgement >**

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