



MALTA

**TRIBUNAL TA' REVIZJONI AMMINISTRATTIVA**

**MAGISTRAT DR.**

**GABRIELLA VELLA**

Seduta tal-21 ta' Lulju, 2014

Rikors Numru. 211/2012

**Global Parcels Limited**

**Vs**

**L-Awtorità ta' Malta Dwar il-Komunikazzjoni**

**It-Tribunal,**

Ra r-Rikors ipprezentat mis-socjetà Global Parcels Limited fit-13 ta' Jannar 2012 quddiem il-Bord ta' l-Appelli Dwar il-Komunikazzjonijiet, in segwitu trasferit quddiem dan it-Tribunal, permezz ta' liema titlob li tigi annullata, imhassra u revokata d-decizjoni ta' l-Awtorità ta' Malta Dwar il-Komunikazzjoni notifikata lilha b'ittra datata 15 ta' Dicembru 2011, fejn gie deciz li *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. 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*, u minflok jigi dikjarat li s-servizz provdut minnha jaqa' fil-parametri ta' *express service* u konsegwentement ma hemm l-ebda htiega li hija tapplika ghal licenza ulterjuri sabiex tippovdi servizzi li jaqghu taht il-*universal service*, bl-ispejjez kontra l-Awtorità ta' Malta Dwar il-Komunikazzjoni;

Ra d-dokumenti esebiti mis-socjetà Rikorrenti flimkien mar-Rikors promotur a fol. 119 sa' 1 tal-process;

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Ra t-talba avvanzata mis-socjetà Rikorrenti quddiem il-Bord ta' l-Appelli Dwar il-Komunikazzjonijiet sabiex minnufih tigi ordnata s-suspensjoni ta' l-effetti kollha tad-decizjoni ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni pendenti l-ezitu ta' dawn il-proceduri. Ra li t-talba tas-socjetà Rikorrenti giet milqugha mill-Bord b'Digriet moghti fit-13 ta' Frar 2012 u in segwitu rikonfermata b'Digriet moghti fid-29 ta' Marzu 2012;

Ra r-Risposta ta' l-Awtorità intimata ghall-appell interpost mis-socjetà Rikorrenti permezz ta' liema topponi ghat-talbiet ta' l-istess socjetà u titlob li l-istess jigu michuda, bl-ispejjez kontra is-socjetà Rikorrenti;

Ra d-dokumenti esebiti mill-Awtorità intimata flimkien mar-Risposta taghha markati Dok. "MCA1" sa' Dok. "MCA3" a fol. 149 sa' 137 tal-process;

Ra l-affidavit ta' Damian Gatt, rapprezentant ta' l-Awtorità intimata, u d-dokumenti annessi mieghu markati Dok. "DG1" u Dok. "DG2", ipprezentati quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet<sup>1</sup>, ra t-traskrizzjoni tax-xhieda ta' Pierre Attard<sup>2</sup>, rapprezentant tas-socjetà Rikorrenti, moghtija quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet waqt is-seduta ta' l-10 ta' April 2012, ra t-traskrizzjoni tax-xhieda ta' Ian Agius, Chief of Operations ma' l-Awtorità intimata, moghtija quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet waqt is-seduti ta' l-10 ta' April 2012<sup>3</sup> u tas-16 ta' April 2012<sup>4</sup> u ra d-dokumenti esebiti minnu markati Dok. "GGGG3" sa' Dok. "GGGG9" a fol. 348 sa' 370 tal-process u ra d-dokumenti markati Dok. "GGGG10" u Dok. "GGGG11" a fol. 383 sa' 394 tal-process u d-dokumenti Dok. "GGGG1" a fol. 440 sa' 398 tal-process u Dok. "GGGG2" a fol. 442 u 441 tal-process;

Ra r-Rikors ipprezentat mill-Awtorità intimata fl-14 ta' Awwissu 2012 permezz ta' liema talbet ir-revoka *contrario imperio* tad-Digriet tal-Bord ta' l-Appelli dwar il-Komunikazzjonijiet tad-29 ta' Marzu 2012, permezz ta' liema giet ordnata s-suspensjoni ta' l-effetti tad-decizjoni appellata, u ra r-Risposta tas-socjetà Rikorrenti. Ra li b'Digriet moghti fit-22 ta' Ottubru 2012 it-Tribunal cahad it-talba ta' l-Awtorità intimata;

Sema' x-xhieda ta' Damian Gatt moghtija waqt is-seduti ta' tat-23 ta' Ottubru 2012<sup>5</sup>, tad-29 ta' Novembru 2012<sup>6</sup> u tal-21 ta' Jannar 2013<sup>7</sup> u sema' x-xhieda ta' Pierre Attard moghtija waqt is-seduti tal-21 ta' Jannar 2013<sup>8</sup> u ta' l-10 ta' Gunju 2013<sup>9</sup>;

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<sup>1</sup> Fol. 223 sa' 214 tal-process.

<sup>2</sup> Fol. 343 tal-process.

<sup>3</sup> Fol. 342 sa' 340 tal-process.

<sup>4</sup> Fol. 374 sa' 372 tal-process.

<sup>5</sup> Fol. 506 sa' 462 tal-process.

<sup>6</sup> Fol. 542 sa' 508 tal-process.

<sup>7</sup> Fol. 549 sa' 544 tal-process.

<sup>8</sup> Fol. 575 sa' 550 tal-process.

<sup>9</sup> Fol. 595 sa' 580 tal-process.

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Ra n-Nota ta' l-Osservazzjonijiet tas-socjetà Rikorrenti pprezentata fid-19 ta' Awwissu 2013 a fol. 614 sa' 596 tal-process u n-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità intimata a fol. 634 sa' 617 tal-process;

Sema' t-trattazzjoni finali da parte tad-difensuri tal-partijiet;

Ra l-atti l-ohra kollha tal-kawza;

### **Ikkonsidra:**

B'ittra datata 15 ta' Dicembru 2011<sup>10</sup> l-Awtorità intimata għarrfet lis-socjetà Rikorrenti bid-decizjoni tagħha fil-konfront ta' l-istess socjetà in segwitu għall-ilmunt ta' MaltaPost p.l.c. kontra s-socjetà Rikorrenti, General Logistics Services u Airsped Express Limited.

Id-decizjoni ta' l-Awtorità intimata fil-konfront tas-socjetà Rikorrenti essenzjalment hija li *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. 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 25<sup>th</sup> 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 because of what MaltaPost describes as "international security purposes". 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. 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 services as a "non-express deferred service" to differentiate it from the service provided by other express operators (see above para 2.6). The MCA considers that GPL fails in at least three*

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<sup>10</sup> Fol. 119 sa' 112 tal-process.

*important aspects which characterize 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 services (apart from the possibility of changing 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. In line with Decision 1 of the 25<sup>th</sup> 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. 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. The MCA after having considered its regulatory decision of the 25<sup>th</sup> 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. 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.*

Is-socjetà Rikorrenti hassitha aggravata bid-decizjoni ta' l-Awtorità intimata w interponiet dan l-appell minnha quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet, li in segwitu gie trasferit quddiem dan it-Tribunal. Is-socjetà Rikorrenti titlob li d-decizjoni ta' l-Awtorità intimata fil-konfront taghha tigi annullata, revokata w imhassra u minflok jigi dikjarat li s-servizz provdut minnha jaqa' fil-parametri ta' *express service* u li konsegwentement ma hemm l-ebda htiega li hija tapplika ghal licenza ulterjuri sabiex tipprovdi servizzi li jaqghu taht il-*universal service*. Hija tibbaza l-appell taghha fuq l-aggravju centrali li l-konkluzzjoni raggunta mill-Awtorità intimata dwar in-natura tas-servizz minnha provdut hija zbaljata – u dana vis-à-vis kull wiehed mit-tlett rekwiziti li skond l-Awtorità intimata ma jiffigurawx fin-natura tas-servizz minnha provdut – in kwantu bbazata fuq apprezzament zbaljat tal-fatti u interpretazzjoni zbaljata tal-parametri tas-servizz provdut minnha.

L-Awtorità intimata topponi ghall-appell tas-socjetà Rikorrenti mid-decizjoni taghha tal-15 ta' Dicembru 2011 u titlob li t-talbiet ta' l-istess socjetà Rikorrenti jigu michuda stante li kuntrarjament ghal dak minnha allegat bhala fatt it-tlett nuqqasijiet ravvizati mill-Awtorità fid-decizjoni taghha, ossia li s-socjetà Rikorrenti ma tipprovdux *guaranteed delivery times*, li ma taghti l-ebda rabta lill-klijent li fi zmien 24 siegha mill-wasla ta' l-artiklu postali f'Malta dan jigi kkunsinnat u li ma tipprovdux ghal *value added services* addizzjonali, jirrizultaw bl-iktar mod car kemm b'ammissjoni ta' l-istess socjetà Rikorrenti kif ukoll mid-dokumentazzjoni minnha sottomessa lill-Awtorità waqt l-investigazzjoni ta' l-ilment da parte tal-MaltaPost. L-Awtorità intimata in oltre tosserva li fejn is-socjetà Rikorrenti tghid li l-Awtorità iddecidiet illi s-servizz ipprovdut mill-appellanti *Global Parcels Limited* jaqa' fil-parametri tas-servizz universali in realtà l-Awtorità osservat illi s-servizz

*provdut mill-GPL '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.*

It-Tribunal jibda biex josserva li l-bazi tad-decizjoni ta' l-Awtorità intimata fil-konfront tas-socjetà Rikorrenti hija d-decizjoni ta' l-istess Awtorità intitolata *Regulatory Direction on Specific Aspects of the Universal Postal Service* pubblikata fil-25 ta' Marzu 2011, u senjatament Decision 4 li tittratta dwar *Express Mail Services* fejn appuntu gie stabbilit x'jikkostitwixxi *an express mail service* ghall-finijiet ta' l-Awtorità intimata u tar-regolamentazzjoni li ghandha timplimenta f'dan is-settur. It-Tribunal jaghmilha cara li dan l-appell ma huwiex u ma jistax jintuza bhala appell mill-imsemmija Decizjoni u b'mod partikolari minn Decision 4 izda, huwa appell mid-decizjoni ta' l-Awtorità fil-konfront tas-socjetà Rikorrenti tal-15 ta' Dicembru 2011 li hija bbazata, kif inghad, fuq dak dispost u provdut f'Decision 4 u fid-Decizjoni pubblikata fil-25 ta' Marzu 2011. B'hekk dak li ghandu jaghmel it-Tribunal fil-kuntest ta' dan l-appell huwa li jiddetermina jekk l-Awtorità intimata applikatx b'mod korrett, ragjonevoli u proporzjonat dak dispost u provdut fid-Decizjoni pubblikata fil-25 ta' Marzu 2011, u b' mod partikolari f'Decision 4, ghall-fattispecie tal-kaz in ezami u ghan-natura tas-servizz attwalment provdut mis-socjetà Rikorrenti.

Fl-imsemmija Decision 4 l-Awtorità intimata tiddisponi u tipprovdi s-segweni: *the MCA will use the definition below when determining whether a service can be classified as an express mail service, therefore falling outside the scope of the universal postal service. **Express Mail Services**<sup>11</sup> consist 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. "Local express mail" means a postal article originating from a sender in Malta and intended for delivery to an addressee in Malta within 24 hours. "**Cross-border express mail**"<sup>12</sup> means a postal article: originating from a sender in Malta and intended for a delivery to a destination outside Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal postal service [outbound]; originating from a sender outside Malta and intended for delivery to Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal postal service and delivered within 24 hours after arrival in Malta. In addition to greater reliability and speed throughout the supply of the service (as refereed to in point 1 of this Decision 4), an **express mail service must also include the following set of supplementary characteristics**<sup>13</sup>: 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*

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<sup>11</sup> Enfasi tat-Tribunal in kwantu din id-definizzjoni hija pertinenti ghall-appell in ezami.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

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*operator must obtain written acknowledgement of delivery from the person receiving the express mail item; and have additional value-added features over the service falling within the scope of the universal service involving, amongst others, the possibility of a premium price for a better quality of service.*

Kif già iktar 'l fuq osservat fid-decizjoni taghha tal-15 ta' Dicembru 2011 l-Awtorità intimata, wara li kkunsidrat in-natura tas-servizz provdut mis-socjetà Rikorrenti, u dana skontha a bazi ta' informazzjoni u dokumentazzjoni provduta lilha mill-istess imsemmija socjetà, waslet ghall-konkluzzjoni li s-servizz provdut mis-socjetà Rikorrenti ma jaqax entro l-parametri ta' *express mail service* ghaliex 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 services (apart from the possibility of changing destination and address in transit which GPL claims to be catered for).* It-Tribunal ser jittratta kull wahda minn dawn in-nuqqasijiet ravvizati mill-Awtorità intimata fis-servizz provdut mis-socjetà Rikorrenti u ser jibda l-ewwel bil-kwistjoni li skont l-Awtorità is-servizz provdut mis-socjetà Rikorrenti *does not provide guaranteed delivery times both with regard to its inbound and outbound mail services.*

Mill-provi prodotti mill-Awtorità intimata u min-Nota ta' Sottomissjonijiet Responsiva taghha johrog car li skontha s-socjetà Rikorrenti ma toffrix *guaranteed delivery times both with regard to its inbound and outbound mail services* ghaliex tali *guaranteed delivery times* ma jirrizultawx mill-istandard terms and conditions ta' l-istess socjetà u dana kuntrarjament ghal dak rikjest mill-Awtorità fid-Decizjoni pubblikata fil-25 ta' Marzu 2011 u b'mod partikolari f'Decision 4.

Fin-Nota ta' Sottomissjonijiet Responsiva taghha l-Awtorità intimata tissottometti li *marbut b'mod intrinsiku ma' l-ewwel rekwizit hawn fuq spjegat [ossia li express service huwa 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 – liema rekwizit se jigi trattat mit-Tribunal iktar 'l quddiem f'din id-decizjoni] huwa r-rekwizit l-iehor li servizz postali ghandu jissodisfa sabiex jigi meqjus bhala express. Skont dan ir-rekwizit, servizz postali express “(must) have a guaranteed pre-set delivery time as agreed between the express mail service provider and the sender of the postal article”. Id-decizjoni regolatorja tal-MCA li stabbiliet dan il-kriterju, liema decizjoni hija res judicata, tkompli tispjega illi “such guarantees should be accompanied by appropriate compensation mechanisms (such a mechanism must be made known to the sender) for not meeting the guaranteed pre-set delivery times as agreed with the customer”. Illi kien gie spjegat mill-MCA li r-rekwizit li artikli postali mibghuta permezz ta' servizz express jaslu fid-destinazzjoni taghhom fi zmien stipulat huwa intrinsiku fin-natura tas-servizz stess. Fi kliem l-MCA: The MCA acknowledges that postal services meeting the special needs of customers who require that a series of time-sensitive postal items which are delivered at the precise time or date as specified by the sender (also referred to as guaranteed-time or day-certain deliveries) differ from services falling within the scope of the universal service. Such guaranteed-time or day-certain deliveries (measured from acceptance to delivery) are not deemed to display inter-changeability with the universal postal service as these services meet the special needs of customers who require that a series of time-sensitive postal items of correspondence are delivered at the precise date or time as specified by the sender. <sup>29</sup>These services specifically relate to time-sensitive postal items to be delivered at the precise time or date as requested by the sender. These services clearly do not relate to, for example, the incoming delivery of postal articles, marked*

*as express, as referred to in regulation 16 whereby the exact day or time of delivery (i.e. from acceptance/collection to delivery) is not pre-agreed with the sender. These postal services clearly fall within the scope of the universal postal service.<sup>30</sup> The characteristics of these postal services must be clearly established in the terms and conditions of the service (including, amongst others, appropriate compensation mechanisms for not meeting the guaranteed day or time for delivery as agreed with the sender). Jirrizulta ghalhekk illi l-feature ta' guaranteed pre-set delivery times hija wahda, jekk mhux l-aktar feature prominenti f'servizz express li jiddistingwi dan it-tip ta' servizz mis-servizz postali "ordinarju" tal-Universal Service.*

Minn din is-sottomissjoni t-Tribunal immedjatament jinnota li l-Awtorità intimata torbot id-decizjoni taghha tal-15 ta' Dicembru 2011 fil-konfront tas-socjetà Rikorrenti dwar ir-rekwizit ta' *guaranteed delivery times both with regard to its inbound and outbound mail services* ma' osservazzjoni li hija għaddiet f'*footnote* relatata ma' konsiderazzjonijiet li ghamlet fid-Decizjoni pubblikata fil-25 ta' Marzu 2011. Di fatti għalkemm Decision 4 *per se* tipprovdi li *in addition to the greater reliability and speed throughout the supply of the service (as referred to in point 1 of this Decision 4) an express mail service must also include the following set of supplementary characteristics ... have a guaranteed pre-set delivery time as agreed between the express mail service provider and the sender of the postal service<sup>14</sup>*, ir-rekwizit li tali **guaranteed pre-set delivery times iridu per forza jirrizultaw mill-istandard terms and conditions ta' l-entità li tipprovdi s-servizz, f'dan il-kaz is-socjetà Rikorrenti**, jirrizulta minn **footnote** numru 30 a pagna 13 tad-Decizjoni pubblikata fil-25 ta' Marzu 2011 fil-kuntest ta' l-osservazzjoni ta' l-Awtorità li *the MCA acknowledges that postal services meeting the special needs of customers who require that a series of time-sensitive postal items which are delivered at the precise time or date as specified by the sender (also referred to as guaranteed-time or day-certain deliveries) differ from services falling within the scope of the universal service. Such guaranteed-time or day-certain deliveries (measured from acceptance to delivery) are not deemed to display inter-changeability with the universal postal service as these services meet the special needs of customers who require that a series of time-sensitive postal items of correspondence are delivered at the precise date or time as specified by the sender* għall-finijiet ta' Decision 1 dwar x'jikkostitwixxu *Services within the Scope of the Universal Postal Service*.

Fil-fehma tat-Tribunal din il-metodologija utilizzata mill-Awtorità intimata biex tasal għal decizjonijiet taghha fil-konfront ta' persuni jew entitajiet individwali li jaqghu taht ir-regime regolatorju taghha ma hijiex wahda gusta u korretta. Fil-fehma tat-Tribunal kwalunkwe tip ta' decizjoni – sia wahda ta' natura amministrattiva bhalma hija decizjoni ta' l-Awtorità intimata kif ukoll wahda ta' natura gudizzjarja jew kwazi-gudizzjarja – torbot lill-persuni jew lill-entitajiet li teffettwa primarjament bil-parti dispozittiva taghha, fil-kaz in ezami d-Decisions 1 sa' 4 promulgati mill-Awtorità intimata fid-Decizjoni pubblikata fil-25 ta' Marzu 2011, u sekondarjament bil-konsiderandi li wasslu għal tali decizjoni izda, zgur mhux b'xi osservazzjoni li ssir permezz ta' semplici *footnote*. In effetti f'dan ir-rigward għandu ragun Pierre Attard, rapprezentant tas-socjetà Rikorrenti, jgħid li *b'referenza għad-Dokument GPC1 intitolat Global Parcels Limited – Standard Terms and Conditions of Trading, sa fejn naf jiena nghid li ma hemm guaranteed pre-set*

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<sup>14</sup> Sottolinear tat-Tribunal.

delivery times ghax sa' fejn naf jiena d-Decizjoni numru 4 tal-MCA ta' Marzu 2011 ma tistipluax li dan ghandu jkun fit-Terms and Conditions<sup>15</sup>.

Apparte minn hekk huwa ghal kollox inkoncepibbli ghat-Tribunal kif osservazzjoni li illum qed tintuza kontra is-socjetà Rikorrenti u li skond l-Awtorità intimata turi kemm *il-feature ta' guaranteed pre-set delivery times* **hija wahda, jekk mhux l-aktar feature prominenti f'servizz express li jiddistingwi dan it-tip ta' servizz mis-servizz postali "ordinarju" tal-Universal Service<sup>16</sup>**, saret permezz ta' semplici footnote u ma ddahlitx bhala **parti integrali** tad-Decizjoni u senjatement ta' Decision 4 fil-kuntest ta' liema qed tirrizulta l-iktar rilevanti, biex b'hekk fost affarijiet ohra wkoll tkun soggetta ghal appell da parte tal-persuni jew entitajiet milquta b'dik id-Decizjoni.

Apparte dan kollu appena osservat it-Tribunal fi kwalunkwe kaz ma jaqbilx li dak ravvizat mill-Awtorità intimata fil-konfront tas-socjetà Rikorrenti dwar *il-guaranteed pre-set delivery times*, u cioè li l-imsemmija socjetà ma tipprovdi tali *guaranteed pre-set delivery times*, huwa fattwalment korrett.

Ghalkemm fl-istandard terms and conditions *per se* tas-socjetà Rikorrenti ma hemm xejn provdut dwar *delivery times*, mill-provi prodotti mis-socjetà Rikorrenti, u senjatement mix-xhieda ta' Pierre Attard u d-dokumenti annessi mar-Rikors promotur, irrizulta li bhala fatt is-socjetà Rikorrenti tipprovdi lill-klijenti taghha – u dana fir-rigward tas-servizz ta' *outbound mail* – bi skeda jew ahajr annex ta' *standard transit times ghal outbound delivery zones in Europe* (li huwa s-suq li topera fih is-socjetà Rikorrenti)<sup>17</sup>. Fil-fehma tat-Tribunal dana l-annex una volta provdut lill-klijent fil-kuntest tas-servizz minnu mitlub necessarjament jigi jiffirma parti integrali mill-ftehim milhuq bejnu u s-socjetà Rikorrenti dwar il-konsenja ta' l-oggett formanti l-mertu tas-servizz provdut mis-socjetà Rikorrenti u li b'hekk is-socjetà Rikorrenti tkun effettivament qed tintrabat mal-klijent li l-oggett in kwistjoni jigi kkonsenjat fiz-Zona relattiva entro t-terminu indikat. Jigi ribadit li skond id-Decision 4 irid ikun hemm ***a guaranteed pre-set delivery time as agreed between the express mail service provider and the sender of the postal article*** u fil-fehma tat-Tribunal il-mod ta' kif topera s-socjetà Rikorrenti fil-kuntest ta' *outbound delivery* jinkwadra ruhu sew f'dan ir-rekwizit ghaliex kif inghat b'dak l-Annex is-socjetà Rikorrenti effettivament tintrabat fil-konfront tal-klijent taghha li teffettwa l-konsenja ta' l-oggett entro t-terminu hemm specifikat skond iz-Zona relattiva fejn ghandha ssir il-konsenja.

Ghalkemm din l-informazzjoni nghatat lill-Awtorità intimata fiz-zmien li kienet qed tikkonsidra n-natura tas-servizz provdut mis-socjetà Rikorrenti u l-istess Awtorità ma sabet ebda prova kuntrarja ghaliha, hija ghazlet li tinjora l-import taghha in bazi ghall-konsiderazzjoni li s-socjetà Rikorrenti ma toffrix *guaranteed pre-set delivery time* izda biss *targets* generali u ma toffri l-ebda kumpens lill-klijent taghha f'kaz li tonqos li tikkonsenja l-oggett mertu tas-servizz entro t-termini ta' zmien indikati fl-annex in kwistjoni, rekwizit dan ta' l-ahhar li ukoll skont l-Awtorità intimata huwa ta' importanza kardinali, kif rizultanti mid-Decizjoni

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<sup>15</sup> Xhieda moghtija in kontro-ezami quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet waqt is-seduta ta' l-10 ta' April 2012, fol. 343 tal-process. Sottolinear tat-Tribunal.

<sup>16</sup> Enfasi tat-Tribunal.

<sup>17</sup> Annex D a fol. 77 tal-process.



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pubblikata fil-25 ta' Marzu 2011, biex servizz postali jikkwalifika bhala *express mail service*.

Din il-posizzjoni ta' l-Awtorità intimata tirrizulta b'mod car mix-xhieda ta' Damian Gatt, rapprezentant ta' l-Awtorità intimata, u ta' Ian Agius, Chief of Operations ta' l-Awtorità intimata, kif ukoll min-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità.

B'mod partikolari fir-rigward Damian Gatt jghid illi *amongst the characteristics that an Express Mail Service must contain, are greater reliability and speed throughout the supply of the service (when compared to that of the fastest standard category of the basic universal postal service), AS WELL AS the following characteristics, namely that the service must: Be clearly identified by the postal operator as an Express postal service from acceptance to delivery (namely that 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 (namely 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, coupled with an appropriate compensation mechanism**<sup>18</sup> – which mechanism must be made known to the sender – for not meeting the guaranteed pre-set delivery time as agreed with the customer (namely the sender of the postal article); ... in line with the regulatory Decision of the 15 December 2011 which GPL is contesting in this present appeal, GPL did not comply with the requirements of Decision 4 referred to above, in that it does not have a guaranteed pre-set delivery time and it does not give an express and unequivocal commitment to the user of its services that if the postal article is not delivered within a special timeframe it would then accordingly compensate the user for failure to deliver in accordance with any given delivery time commitments. In this context I refer to the presentation presented by GPL [hereafter referred to as 'GPL presentation'] in these appeal proceedings, in particular to slide 10 (Appendix B) and slide 11 (Appendix D) which lists transit times for outbound parcels from Malta to Europe. These slides confirm the correctness of MCA's stance in relation to the GPL services (i.e. that these do not qualify as "Express" mail services). In fact, from a reading of these Slides nowhere does it result that GPL provide a guaranteed delivery time and give compensation thereon if these are not complied with. What GPL does provide is an estimate number of days within which the postal article may be delivered<sup>19</sup>. In kontro-ezami waqt is-seduta tad-29 ta' Novembru 2012<sup>20</sup>, Damian Gatt izid jghid li z-zminijiet indikati mis-socjetà Rikorrenti huma biss targets ghalix ma jorbtux, ... jistghu jaslu f'4 to 6 days imma m'hemmx obbligu li jkunu guaranteed u in ri-ezami waqt is-seduta tal-21 ta' Jannar 2013<sup>21</sup> itenni li meta harisna lejn is-servizz provdut minn GPL, non-express service, anzi kkonfermaw huma li s-servizz m'ghandux guaranteed delivery times jigifieri meta s-sender ta' l-item imur biex jibghat postal parcel, they don't offer a guaranteed end to end delivery time from acceptance to receipt by the addressee nowhere, they always refer that this service does not provide for guaranteed deliveries but provides for*

<sup>18</sup> Enfasi ta' l-istess Damian Gatt.

<sup>19</sup> Para. 1.3, 1.8 u 1.9 ta' l-affidavit ta' Damian Gatt a fol. 332 sa' 330 tal-process. Sottolinear tat-Tribunal.

<sup>20</sup> Fol. 542 sa' 508 tal-process.

<sup>21</sup> Fol. 549 sa' 544 tal-process.

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*general delivery targets. They offer a delivery target between 2 to 7 days but nowhere is the service defined as having guaranteed delivery targets. ... Meta nigu x'nhu express service irid ikollu a guaranteed delivery time frame jigifieri meta xi hadd imur biex jibghat parcel post he can opt for different services. One of the services which is express mail service were he asks that this item is delivered within a guaranteed specific time frame as opposed to general delivery targets, so the range would be for example 2 to 7 days, it can arrive within 2 to 7 days but it can arrive after. Ghad-domanda specifika what would make it a guaranteed delivery time? What would qualify? Damian Gatt irrisponda specifically the customer is entitled to some form of compensation if the item does not arrive within the established guaranteed delivery time declared to him by the operator<sup>22</sup>.*

Ian Agius ukoll jghid li minkejja li l-Awtorità kienet innotifikat lis-socjetà appellanti bin-nuqqas ta' guarantee ghaz-zmien ta' delivery, Global Parcels qatt ma indikaw jew taw konferma li hija fil-fatt tipprovidi servizz garantit. Mitlub nispejja x'inhija Compensation Scheme, nghid li provider tas-servizz postali ghandu obbligu li jhallas kumpens lill-klijent jekk ma jigux sodisfatti t-terms and conditions tas-servizz. Ir-rilevanza ta' compensation scheme tohrog mill-fatt li f'kaz ta' servizzi li jkun express service huwa meqjus indispensabbli li jkun hemm kumpens fost l-ohrajn jekk id-delivery ma tkunx saret within the timeframe li huwa garantit bhala express service<sup>23</sup>. Fit-Terms and Conditions li Global Parcels baghtet lill-Awtorità dan il-kumpens ma kienx imsemmi. Qabel id-Decizjoni 4 ta' Marzu 2011, il-bzonn ta' compensation scheme ma kienetx mitluba b'mod formali. Sar hekk wara u ghalhekk saret it-talba lis-socjetà appellanti<sup>24</sup>.

Fin-Nota ta' Sottomissjonijiet Responsiva taghha l-Awtorità intimata tikkontendi li l-GPL taghmel it-terms and conditions taghha supreme (paramount) (ara klawwola 1(i)(B) ta' l-iStandard Terms and Conditions of Trading) biex b'hekk jekk hemm kunflitt bejn dawn it-terms and conditions u xi terms and conditions ohrajn, huma l-istandard terms and conditions li jipprevalu fuq l-ohrajn. Mhux talli l-istandard terms and conditions ma jaghtux time limits ghat-tqassim ta' artikli postali, u l-anqas targets generici, izda b'mod esplicitu jeskludu r-responsabbiltà tas-socjetà GPL fejn ikun hemm xi dewmien. Dawn it-terms and conditions jghidu: "The Company shall not be liable for any loss and/or damage ... delay ... non-performance of any obligation, mis-delivery" (klawwola 12(i) tat-Terms and Conditions tal-GPL). B'hekk mhux talli l-GPL ma tipprovidix garanzija li l-arkilu postali ser jasal fid-destinazzjoni tieghu f'hin partikolari, izda anzi jispejfa li l-GPL ma tistax tinzamm responsabbli ghal xi forma ta' dewmien. Isegwi b'mod naturali u logiku li l-GPL ma tohloqx xi forma ta' kumpens ghal dewmien, u cioe jekk l-artiklu postali ma jasalx fi zmien moghti lill-konsumatur jew klijent ahhari. Barra minn hekk, l-anqas ma wiehed jista' jargumenta li l-klawwoli ta' l-istandard terms and conditions dwar responsabbiltà generika tal-GPL (u cioe klawwola 11) tista' tigi applikata bhala kumpens ghal dewmien. Fl-ewwel lok id-diversi paragrafi ta' l-imsemmija klawwola 11 ta' l-istandard terms and conditions tal-GPL jindirizzaw esklussivament loss or damage sofferti mill-klijent tal-GPL. Din hija sitwazzjoni kompletament differenti ghal-kumpens ghal dewmien li titkellem dwaru d-Decision 4 tad-Decizjoni ta' l-MCA tal-25 ta' Marzu 2011 fejn m'huwiex il-kaz li wiehed irid isofri xi danni sabiex jigi

<sup>22</sup> Sottolinear tat-Tribunal.

<sup>23</sup> Sottolinear tat-Tribunal.

<sup>24</sup> Sottolinear tat-Tribunal.

*indenizzat. Il-kumpens taht l-imsemmija Decizjoni hija bazi ta' kif il-provditur tas-servizz jiggarrantixxi li l-artiklu postali jasal fiz-zmien stipulat u b'hekk, malli jkun hemm dewmien ghandu jiskatta l-hlas tal-kumpens irrispettivament minn jekk il-klijent isofrix dannu jew telf<sup>25</sup>. Minbarra dan, il-paragrafu (ii) u l-paragrafi li jaqghu tahtu, jirrigwardaw il-limiti ta' kumpens tal-GPL meta l-klijent isofri telf jew danni kagun tan-negligenza tal-GPL u biss jekk dan huwa ppruvat. Hawn ukoll hemm differenza essenzjali ghal dak li tirrikjedi d-Decizjoni tal-MCA tal-25 ta' Marzu 2011 fejn il-kumpens ma huwiex marbut ghal xi htija da parti ta' min jipprovi s-servizz postali u wisq anqas ghall-prova ta' tali htija. Taht l-imsemmija decizjoni, appena kif l-artiklu postali jghaddi mill-klijent ghand l-operatur postali, ir-responsabbiltà tal-istess operatur li jwassal l-artiklu postali fiz-zmien stipulat jiskatta biex b'hekk, appena l-istess artiklu ma jasalx fid-destinazzjoni tieghu, jiskatta d-dritt ghall-kumpens lill-utent tas-servizz postali<sup>26</sup>. Dan id-dritt ghall-kumpens ghad-dewmien huwa ghal kollox separat u 'l fuq mid-dritt li wiehed jirkupra minghand il-provditur tas-servizz postali d-danni subiti minhabba fid-dolus jew negligenza ta' l-istess provditur tas-servizz. Huwa biss dwar dawn it-tip ta' danni li jittkellmu t-terms and conditions tal-GPL li jillimitaw id-danni li l-GPL tista' tkun esposta ghalihom. Bl-ebda mod ma jista' wiehed jinterpreta dawn il-klausoli ta' l-istandard terms and conditions bhala li qed jaghtu kumpens ghal guaranteed pre-set delivery times ta' l-artikli postali<sup>27</sup>.*

Mix-xhieda u sottomissjonijiet appena citati johrog ferm car li l-Awtorità intimata tikkontendi li **skont id-Decizjoni taghha pubblikata fil-25 ta' Marzu 2011, inkluza Decision 4**, sabiex termini ta' zmien ghall-konsenja ta' oggett postali jitqiesu bhala *guaranteed pre-set delivery times* ghall-finijiet ta' *express mail delivery service* il-providtur tas-servizz irid joffri kumpens ghal dewmien u peress illi skontha dan il-kumpens hekk necessarju u fundamentali skont id-Decizjoni tal-25 ta' Marzu 2011 ma huwiex offrut u provdut mis-socjetà Rikorrenti, is-servizz provdut mis-socjetà Rikorrenti ma jikkwalifikax bhala *express mail service* kif definit u stabbilit fl-imsemmija Decizjoni tal-25 ta' Marzu 2011.

Minn qari ta' l-imsemmija Decizjoni però it-Tribunal jinnota li l-kwistjoni tal-kumpens ghal dewmien ma tiffigurax fil-konsiderazzjonijiet tad-Decizjoni jew fid-*Decisions 1 sa' 4* promulgati mill-Awtorità intimata izda, f'dan il-kaz ukoll, issir referenza ghalha biss fil-*footnotes*, senjatament fil-*footnote 30* fil-kuntest tal-konsiderazzjoni ta' l-interchangability bejn *universal postal service* u *express mail service* fejn jinghad li *the characteristics of these postal services [ossia express mail service a paragon ta' universal postal service] must be clearly established in the terms and conditions of the service (including, amongst others, appropriate compensation mechanisms for not meeting the guaranteed day or time for delivery as agreed with the sender)*, u fil-*footnote 88* relattiva ghat-tielet karatteristika supplementary li *express mail service* ghandu joffri skond Decision 4, fejn jinghad illi *this clause was not originally included in the MCA's proposal. It is being explicitly set out in this decision that postal services having a guaranteed pre-set delivery time should be considered as express mail services. The MCA notes that such guarantees should be accompanied by appropriate compensation mechanisms (such a*

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<sup>25</sup> Sottolinear tat-Tribunal.

<sup>26</sup> *Ibid.*

<sup>27</sup> Para. 55 sa' 60 tan-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità intimata.

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*mechanism must be made known to the sender) for not meeting the guaranteed pre-set delivery time as agreed with the customer.*

F'dan il-kaz ukoll it-Tribunal ma jqisx li huwa lecit u da parte ta' l-Awtorità intimata li tikkonsidra u tikkritika s-servizz provdut mis-socjetà Rikorrenti a bazi ta' *footnote* u mhux a bazi tal-konsiderandi u decide vera e proprio tad-Decizjoni taghha tal-25 ta' Marzu 2011. Mill-gdid it-Tribunal josserva li huwa ghal kollox inacetabbli li llum l-Awtorità intimata tikkritika lis-socjetà Rikorrenti ghaliex is-servizz minnha provdut ma joffrix element li skontha huwa ta' importanza kardinali ghal fini li servizz postali jikkwalifika bhala *express mail service* meta l-istess Awtorità lanqas dehrilha li kellha tinkorpora tali element fil-konsiderazzjonijiet tad-Decizjoni taghha jew addirittura fid-Decisioni infushom izda, irrelegatu ghal semplici osservazzjoni f'*footnote*. B'hekk it-Tribunal iqis li din il-konsiderazzjoni partikolari ta' l-Awtorità intimata fir-rigward tad-delivery times li bihom is-socjetà Rikorrenti kjarament tintrabat vis-à-vis il-klijent taghha ghal dak li jirrigwarda *outbound parcels* ma hijiex gustifikata u b'hekk ma jisthoq li tigi minnu sostnuta u kkonfermata.

F'dan l-istadju t-Tribunal jaghmel osservazzjoni ulterjuri dwar is-sottomissjonijiet avvanzati mill-Awtorità intimata fir-rigward tas-servizz ta' l-*outbound mail* provdut mis-socjetà Rikorrenti u cioè fejn issostni li *jirrizulta wkoll, allura, li sabiex servizz postali jikkwalifika bhala express service irid [fost affarijiet ohra] (i) jistabilixxi guaranteed time or day-certain deliveries ...* Ghalkemm fin-Nota ta' Sottomissjonijiet Responsiva taghha l-Awtorità intimata tishaqq li din il-karatteristika ta' *day-certain deliveries* hija fundamentali sabiex servizz postali jitqies bhala *express mail service*, jigi rilevat li ai termini ta' Decision 4 dak li hu mehtieg ghall-fini ta' l-Awtorità u tar-regolamentazzjoni da parte taghha huwa li s-servizz ikollu *a guaranteed pre-set delivery time as agreed between the express mail service provider and the sender of the postal article*. Imkien fid-Decision 4 ma tissemma l-karatteristika ta' ***day-certain deliveries*** u mix-xhieda ta' Damian Gatt iktar '1 fuq citata johrog car li l-Awtorità intimata ma tinsistix fuq din il-karatteristika izda fuq il-karatteristika ta' *guaranteed pre-set delivery times*. B'hekk il-fatt li s-socjetà Rikorrenti tipprovdni ghal konsenja ta' l-artiklu postali entro terminu ta' zmien, ad ezempju 2 to 4 *working days*, u mhux ghall-konsenja f'data specifika, ossia *day-certain delivery*, ma ghandux jimmilita kontra taghha u ma huwiex lecit li l-Awtorità intimata tuza tali fatt biex issostni li s-servizz provdut mill-imsemmija socjetà ma jikkwalifikax bhala *express mail service* skond id-Decizjoni moghtija minnha fil-25 ta' Marzu 2011.

Fir-rigward ta' l-*inbound parcels* l-Awtorità intimata wkoll tikkontendi li s-socjetà Rikorrenti ma tipprovdni l-ebda *guaranteed pre-set delivery times* fl-istandard terms and conditions taghha u ghalhekk lanqas dan is-servizz ma jaqa' taht il-parametri ta' *express mail service*. Din l-osservazzjoni però hija fil-fehma tat-Tribunal intrinsikament zbaljata ghaliex ghall-fini tal-konsiderazzjoni tas-servizz ta' ***inbound parcels*** l-Awtorità ma kellhiex tara u tikkonsidra l-istandard terms and conditions tas-socjetà Rikorrenti izda kellha tara u tikkonsidra t-termini u l-kondizzjonijiet offruti minn General Logistics Services, li taghha s-socjetà Rikorrenti hija l-agent ghall-finijiet ta' *inbound parcels* ghal hawn Malta, konsiderazzjoni però li jirrizulta li ma ghamlitx.

Ghalkemm l-Awtorità intimata tirrikonoxxi u taghraf li s-socjetà Rikorrenti tirrappreżenta lil General Logistics Services f'Malta u ghan-nom taghha toffri servizzi f'Malta, hija kkunsidrat din ir-relazzjoni kummercjali limitatament mill-aspett ta' x'tip ta' servizzi toffri l-General Logistics Services u peress illi din is-socjetà toffri wkoll servizzi ta' *parcel post* l-Awtorità, fil-fehma tat-Tribunal b'mod ghal kollox zbaljat, waqfet hemm fil-konsiderazzjonijiet taghha u erronejament

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ikkonkludiet li s-socjetà Rikorrenti bilfors tipprovdi tali servizz ta' *parcel post* hawn Malta bil-konsegwenza li s-servizzi tas-socjetà Rikorrenti qatt ma jistghu jikkwalifikaw bhala *express mail service*.

Dan ir-ragunament ta' l-Awtorità intimata jirrizulta b'mod car mir-Risposta taghha ghall-Appell tas-socjetà Rikorrenti fejn tippremetti li *bla pregudizzju ghal-bqija tas-sottomissjonijiet f'din ir-risposta isir riferenza ghas-sit elettroniku tal-GLS – il-General Logistics Services – il-kumpanija li l-GPL tirrapprezenta f'Malta u li ghan-nom taghha toffri servizzi postali f'Malta. F'dan ir-rigward l-Awtorità appellata qed tipprezenta print-out ta' whud mill-pagni tas-sit elettroniku [li qed jigu hawn annessi bhala Dok. MCA3]. Mill-ewwel pagna ta' l-anness Dok. MCA3 jirrizulta li GLS – tramite l-GPL – toffri f'Malta kemm servizzi postali ta' *parcel* kif wkoll ta' *express*. F'dan ir-rigward isir riferenza ghat-tieni u tielet pagni ta' l-anness dok MCA3 ghar-rigward tal-Parcel u Euro Business-Small Parcel, u ghal pagni erbgha u hamsa ta' l-anness dok MCA3 fir-rigward tas-servizz *Express* u l-Euro *Express-Parcel*. Minn ezami ta' dawn il-pagni jirrizulta bic-car li l-istess GLS – allura w ukoll il-GPL li tirrapprezenta l-istess f'Malta – taghmel distinzjoni netta bejn fuq naha wahda servizz postali ta' *Parcel* u fuq in-naha l-ohra, servizz postali ta' *Express*. Dan juri bic-car li anke mill-istess sit elettroniku tal-GLS – il-kumpanija li allura ghan-nom taghha l-GPL toffri servizzi postali f'Malta – hemm distinzjoni cara u qed jigu offruti zewg tipi ta' servizzi cioè wiehed li hu garr tal-parcels tramite l-*parcel post*, u iehor li hu dak tarmite servizz *express*. Hu ghalhekk sottomess li anke mill-istess sit elettroniku jirrizulta li qed jigu offruti kemm servizzi ta' *parcel post* – li allura jaqa' *within the scope of the universal service b'mod partikolari huwa komparabbli mal-gbir ta' oggetti postali, transport u distribuzzjoni ta' parcels postali sa' ghoxrin kilogramma – kif ukoll toffri servizzi postali express*<sup>28</sup>.*

Fil-fehma tat-Tribunal din il-konkluzzjoni ta' l-Awtorità intimata hija zbaljata in kwantu ghal kollox bla bazi fattwali u b'konsegwenza ta' hekk l-istess Awtorità erronejament ma kkunsidratx it-termini u kondizzjonijiet provduti minn General Logistics Services ghall-fini ta' *guaranteed pre-set delivery times ghall-inbound service* u waslet ghall-konkluzzjoni zbaljata li fir-rigward ta' tali servizz is-socjetà Rikorrenti ma tipprovdi *an express mail service*.

Apparte l-fatt li Pierre Attard, in rappreżentanza tas-socjetà Rikorrenti, kategorikament cahad li l-istess socjetà tipprovdi servizzi ta' *parcel post* ghan-nom ta' General Logistics Services hawn Malta izda ddikjara s-servizz minnha provdut ghall-imsemmija socjetà estera huwa dak purament *express*<sup>29</sup>, dikjarazzjonijiet dawn li bl-ebda mod ma gew kontradetti mill-Awtorità intimata, mix-xhieda ta' Damian Gatt jirrizulta b'mod car li l-Awtorità intimata waslet ghall-konkluzzjoni li is-socjetà Rikorrenti tipprovdi servizz ta' *parcel post* ghal General Logistics Services in bazi ghal semplici assunzjonijiet li ma huma sorretti bl-ebda fatt konkret.

Waqt is-seduta tat-23 ta' Ottubru 2012<sup>30</sup> Damian Gatt iddikjara li l-GPL tipprovdi l-*inbound* u l-*outbound service* jigifieri *outbound* imorru n-nies ghandhom biex jibghatu il-*parcels* barra u minn barra mhux qed joriginaw bhala *express* qed joriginaw bhala *parcels*. Ghad-domandi tista' tghidli minn fejn jirrizultalek dan? U tista' tindikali ghal liema korrispondenza qed taghmel referenza ghalha li ma joriginawx minn

<sup>28</sup> Sottolinear tat-Tribunal.

<sup>29</sup> Vide xhieda moghtija waqt is-seduta tal-21 ta' Jannar 2013, fol. 575 sa' 550 tal-process.

<sup>30</sup> Fol. 506 sa' 462 tal-process.

barra bhala express? Damian Gatt irrisponda *differed postal services. Dawn dejjem qalulna u dejjem hekk qalulna. Ghall-mistoqsija ulterjuri insa x'qalulek, inti qed tghidilna li jirrizulta li dawn ma jitilqux minn barra bhala express, qed nitlobok tindikali minn fejn jirrizultalek li ma jitilqux minn barra bhala express? Damian Gatt irrisponda il-Global Parcels Limited li huwa l-GLS minn barra jipprovi zewg mail flows, jipprovi ordinary parcels u l-express. The items arriving here are not necessarily all express or all parcel, the items which arrive here include parcels as well<sup>31</sup>. Ghall-mistoqsija tat-Tribunal inti l-ewwel ghedtli li m'humix express, issa qed tghidli li parti huma u parti m'humix, huma jew m'humix ha nibdew minn hemm? Damian Gatt irrisponda jista' jkun li jipprovi certu prodott<sup>32</sup> u ghad-domanda jekk nghidlek mhux jista' jkun imma l-parcels kollha jigu bl-express stickers magghom, tista' tghidli minn fejn qed tikkonkludi li m'humix express? Damian Gatt irrisponda l-express sticker doesn't mean anything<sup>33</sup>. Ghad-domanda mela ghaliex a bazi ta' xiex ikkonkludejt li l-parcels li ser jgibu l-Global Parcels m'humix express? Damian Gatt irrisponda the service provided by GPL both the outbound and the inbound, and let's talk about the outbound because the outbound is not express and the characteristics according to the Authority has not guaranteed delivery time etc. Fir-rigward ta' l-inbound barra min baghat il-parcels ghandu s-servizz li huma cross border ordinary parcels u cross border li huma express<sup>34</sup>. Ghad-domanda tat-Tribunal però qabel inti ghamiltli l-istatement li dak li jigi minn barra ghal hawn Malta through GPL m'humix express u l-avukat qed jistaqsik minn fejn jirrizulta? Damian Gatt irrisponda jirrizulta li s-servizz li jipprovi GLS minn barra huma tnejn, issa daww li huma arriving which originated as ordinary parcels fall under classification of parcels. Now classification of express, the general authorisation only provides for somebody who provides only express. Wara hafna tidwir u spjegazzjonijiet mhux relatati mad-domandi li kienu qed isirlu, Damian Gatt iddikjara li jista' jkun li bhala operatur iehor qed jircievi both express and ordinary parcels<sup>35</sup> u ghad-domanda tat-Tribunal dan tafu bhala fatt? huwa irrisponda ma nafux bhala stat ta' fatt<sup>36</sup> u ghall-mistoqsija jiena li qed nistaqsik huwa biex tghidli minn fejn jirrizulta, jekk jirrizulta, ghax l-impressjoni li qed niehu ma jirrizulta minn imkien, imma hija sempliciment impressjoni tieghek, illi l-oggetti li qeghdin gejjin minn barra u jigu f'idejn il-Global Parcels inti ghedtli m'humix express, minn fejn jirrizulta dan skontok? Ghaliex jiena qed nissugerilek li dawn huma kollha express parcels u nahseb li ma nistax inkun aktar car minn hekk<sup>37</sup>. Damian Gatt irrisponda ma nistax inkun hundred percent li kollha huma express<sup>38</sup>.*

Minn din ix-xhieda jirrizulta ferm evidenti li l-Awtorità intimata waslet ghall-konkluzzjoni finali taghha fuq **semplici assunzjoni ta' Damian Gatt** li ghaliex il-General Logistics Services toffri servizz kemm ta' *parcel post* kif ukoll servizz

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<sup>31</sup> Sottolinear tat-Tribunal.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

## Kopja Informali ta' Sentenza

*express* lill-klijenti, allura s-socjetà Rikorrenti *qua* rapprezentant ta' General Logistics Services hawn Malta **bilfors tipprovdi servizzi ta' parcel post ukoll, minghajr però ebda prova konkreta li dan huwa minnu.**

Il-fatt li l-Awtorità intimata waslet għall-konkluzzjoni tagħha minghajr ebda prova konkreta izda fuq semplici assunzjoni għal kollox gratuwita jirrizulta wkoll mill-ittra ta' l-Awtorità lil MaltaPost p.l.c. tat-22 ta' Awwissu 2011<sup>39</sup>, fejn għarrfet lill-istess MaltaPost illi *in your letter of complaint* [datata 18 ta' Awwissu 2011] *you refer to communications between MaltaPost and MCA in June 2010 where you state that MaltaPost had then submitted for MCA's attention documentary proof of parcels/letter packets delivered to Maltapost by GLS. Going through the 2010 documentation made available to MCA it results that on the first page the postal articles in question had "express" written on them. This means that with regard to 2010 cases the service provided was outside the scope of the universal service*<sup>40</sup>. *GLS – as observed in your letter of complaint – effectively is providing its services in Malta either through Airspeed Express Limited ['Airspeed'] and/or GPL. Both latter companies have a general authorisation to provide postal services outside the scope of the universal service. Therefore in the 2010 cases raised the postal services provided by GLS were provided through companies authorised [by a general authorisation] to provide postal services outside the scope of the universal service. MCA on the basis of the information made accessible to it does not in the present circumstances consider that it should pursue an investigation vis-à-vis GLS with regard to the provision of postal services outside the scope of the universal service [and which require only a general authorisation] once Airspeed and GPL enjoy general authorisations to provide such services*<sup>41</sup>. *In the context of MaltaPost's present complaint please advise whether we are correct in our understanding that: your complaint is that GLS, whether directly or through Airspeed and/or GPS, is providing postal services within the scope of the universal service and that therefore an individual licence to provide such services is required; and the basis of your complaint relates specifically to the "Euro business parcel" service under the GLS franchise as stated in the GLS tracking system printout provided by MaltaPost. If the above is correct then MaltaPost is requested to furnish the specific references to the characteristics of the said service which lead it to believe that the provision of this service falls within the scope of the universal service and therefore necessitates an individual licence. In this regard the MCA had published a Decision Notice on Specific Aspects of the Universal Postal Service in March 2011 which should be taken into consideration. Għal din l-ittra l-Awtorità intimata ma jidhirx li rceviet xi risposta jew prova dwar dak allegat mill-MaltaPost izda ciò nonostante xorta wahda kkonkludiet, għax hekk assumiet li qed isir, li s-socjetà Rikorrenti qed tipprovdi servizzi ta' *inbound parcel post* għan-nom ta' General Logistics Services.*

It-Tribunal ma jistax jonqos milli josserva certa inkonsistenza fil-posizzjoni assunta mill-Awtorità intimata fir-rigward tas-servizz provdut mis-socjetà Rikorrenti, partikolarment għal dak li jirrigwarda l-*inbound service*. In effetti fl-imsemmija ittra tat-22 ta' Awwissu 2011 l-Awtorità intimata għarrfet lill-MaltaPost p.l.c. li l-ilment tagħha dwar artikli postali li waslu Malta fl-2010 irrizulta bhala infondat *inter alia* għaliex *the postal articles in question had "express" written on them* izda Damian

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<sup>39</sup> Fol. 61 u 60 tal-process.

<sup>40</sup> Sottolinear tat-Tribunal.

<sup>41</sup> *Ibid.*

## Kopja Informali ta' Sentenza

Gatt illum jikkontendi li *l-express sticker doesn't mean anything*. Din l-inkonsistenza tkompli tixhet iktar dubji fuq il-legittimità u ragjonevolezza tad-decizjoni ta' l-Awtorità intimata vis-à-vis is-socjetà Rikorrenti.

It-Tribunal jirribadixxi li l-Awtorità intimata erronejament waslet ghall-konkluzzjoni li s-socjetà Rikorrenti ma tipprovdux *guaranteed delivery times* ghal *inbound services* ghaliex, apparte dan kollu appena osservat, naqset ukoll milli debitament tikkonsidra l-kondizzjonijiet offerti mill-General Logistics Services, il-principal tas-socjetà Rikorrenti ghall-finijiet ta' dan is-servizz, lill-klijenti taghha, li finalment huma l-persuni jew entitajiet li jibghatu l-artiklu mertu tas-servizz, kif jidhru fuq il-*website* taghha, ossia: (i) *guaranteed delivery the next working day till close of business*; (ii) *transit times <24 hrs (excl. islands and peripheral areas)*; (iii) *additional service options available. TimeDefinite-Services Saturday-Service*; (iv) *Insurance up to €750 per parcel*; (v) *Permanent Tracking & Tracing incl. full delivery information*; (vi) *Money-Back-Guarantee*; u (vii) *One dedicated contact person for your Express dispatch*. Minkejja dak li jirrizulta mill-*website* ta' General Logistics Services l-Awtorità intimata ma investigatx ulterjorment izda waslet ghall-konkluzzjoni affrettata li l-*inbound service* provdut mis-socjetà Rikorrenti ma jipprovdux ghal *guaranteed pre-set delivery times*.

Mix-xhieda li ta Damian Gatt waqt is-seduta tat-23 ta' Ottubru 2012 jirrizulta wkoll li l-Awtorità intimata tqis is-servizz provdut mis-socjetà Rikorrenti bhala wiehed mhux *express mail service* ghaliex skontha s-socjetà Rikorrenti stess dejjem infurmathom li s-servizzi provduti minnha huma *deferred postal services* li allura jfisser li ma humiex *express*. It-Tribunal però ma jistax jaqbel mal-posizzjoni assunta mill-Awtorità intimata kemm tramite r-rapprezentant taghha Damian Gatt kif ukoll fis-sottomissjonijiet minnha avanzati fir-rigward fin-Nota ta' Sottomissjonijiet Responsiva taghha. Ghalkemm Damian Gatt jikkontendi li s-socjetà Rikorrenti dejjem gharrfet lill-Awtorità intimata li s-servizzi provduti minnha huma *deferred postal services*, mill-provi prodotti jirrizulta li b'ittra datata 29 ta' Settembru 2011<sup>42</sup> is-socjetà Rikorrenti kkjarifikat li *we refer to our letter of 16<sup>th</sup> August 2011 where we used the term 'non express deferred' to explain the description of our outbound services. At the time of our application for a general authorisation there was no definition of an express service by the legislator or MCA. So as to differentiate ourselves and not to mislead customers into thinking that the transit time into Europe was identical to those of DHL, FedEx, TNT and UPS, we used the phrase 'non express deferred'. We could have just as easily used the phrase 'international economy' or 'economy express'. In fact we have always marketed ourselves under the Air Cargo & Package Express Service in the Yellow Pages, u ghaldaqstant is-socjetà Rikorrenti, kuntrarjament ghal dak li jipprova jaghti ad intendere Damian Gatt waqt il-kontro-ezami tieghu, ikkwalifikat id-definizzjoni minnha originarjament moghtija fin-Notification Form for General Authorisation.*

Waqt is-seduta ta' l-10 ta' Gunju 2013<sup>43</sup> Pierre Attard, rapprezentant tas-socjetà Rikorrenti, fir-rigward iddikjara li d-definizzjoni li nghatat fin-Notification Form for General Authorisation inghatat *qabel ma dahlet id-decision notice four ghax ma kienx hemm definizzjoni ta' x'inhu express dak iz-zmien. Ahna uzajna dik in-numenklatura u din spjegajtha wkoll lill-MCA fl-ittra sussegwenti ghaliex hemm certu misconception ta' x'inhu express ghax anki sa' llum il-gurnata jekk nuzaw ezempju l-*

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<sup>42</sup> Fol. 97 sa' 85 tal-process.

<sup>43</sup> Fol. 595 sa' 580 tal-process.



## Kopja Informali ta' Sentenza

*kelma vacuum cleaner l-ewwel haga li tigh f'mohhu kulhadd hija hoover. Jekk insemmu express courier l-ewwel kumpanija li tigi f'rashom hija d-DHL u l-express allura means next day u dan is-servizz ma kienx next day. Skond id-decision notice four xorta huwa express imma for the man in the street it is not next day allura mela jghid dan mhux express u ghalhekk uzajna dik it-terminologija ghax ma kienx hemm definizzjoni f'dak l-istadju. Fir-rigward ta' din l-ispjegazzjoni l-Awtorità intimata tikkontendi li l-argument li jaghmel ix-xhud Pierre Attard meta mistoqsi dwar dan in kontro-ezami (p.1 para. 1 tax-xhieda tieghu tas-seduta tal-10 ta' Gunju 2013) ma jinftiehm. Jekk ma kienx hemm definizzjoni ta' express service ma kien hemm xejn x'izomm lill-GPL milli tiddeskrivi s-servizzi li kienet ser tipprovi bhala express services jekk, skont hi, dak li tipprovi dejjem kien jidhol fil-parametri ta' x'inhu ikkunsidrat bhala express service fil-generu tas-servizzi postali. Il-fatt li l-GPL stess, fil-libertà kollha taghha ddeskriviet is-servizzi li kienet ser tipprovi bhala non-express deferred service ma jistax hliet jindika l-iskop u l-intenzjoni tal-GPL li tipprovi servizzi li ma kienux meqjusa bhala express ghaliex ma kienux jikkonformaw mal-istandards ta' servizzi postali express. Kien biss wara li l-MCA ippubblikat id-decizjoni taghha tal-25 ta' Marzu 2011 u bdiet il-proceduri investigattivi taghha li l-istorja inbidlet min-naha tal-GPL, u din ta' l-ahhar bdiet targumenta li s-servizzi li kienet tipprovi kienu fil-fatt fin-natura taghhom express<sup>44</sup>.*

Nonostante dak osservat u sottomess mill-Awtorità intimata fin-Nota ta' Sottomissjonijiet Responsiva taghha fir-rigward ta' dan il-punt partikolari, it-Tribunal ma jistax jonqos milli josserva li originarjament id-deskrizzjoni moghtija mis-socjetà Rikorrenti dwar is-servizzi minnha provduti ma holqot l-ebda dubju fl-Awtorità dwar il-klassifikazzjoni ta' tali servizzi. In effetti in segwitu ghas-sottomissjoni tan-Notification Form for General Authorisation da parte tas-socjetà Rikorrenti, l-Awtorità intimata permezz ta' ittra datata 26 ta' Lulju 2010<sup>45</sup> gharrfet lill-istess socjetà li *in accordance with Regulation 48(3) of the Postal Service (General) Regulations 2005, Global Parcels Ltd. is deemed to be authorised to provide non-reserved postal services outside the scope of the universal service area*<sup>46</sup>. *The granting of this General Authorisation is without prejudice to any direction which may be required under these Regulations.* Ghalkemm f'dik l-istess ittra l-Awtorità intimata talbet lis-socjetà Rikorrenti sabiex taghti iktar dettalji dwar in-natura tas-servizz provdut minnha fid-dawl tad-deskrizzjoni "non-express deferred service" kien biss fid-decizjoni appellata – jigifieri iktar minn sena wara l-ittra ta' Lulju 2010 u wkoll **wara d-Decizjoni pubblikata fil-25 ta' Marzu 2011** – li l-Awtorità intimata, **anke a bazi tad-deskrizzjoni ta' non-express deferred service**, infurmat lis-socjetà Rikorrenti li *the MCA after having considered its regulatory decision of the 25<sup>th</sup> 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*<sup>47</sup>. Dan ifisser ghalhekk li filwaqt li l-Awtorità intimata tippretendi li ghandha kull jedd li in segwitu ghad-Decizjoni tal-25 ta' Marzu 2011 tirrevedi l-posizzjoni taghha vis-à-vis in-natura tas-servizz

<sup>44</sup> Para. 85 tan-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità intimata, fol. 619 u 618 tal-process.

<sup>45</sup> Dok. "GGGG4" a fol. 357 tal-process.

<sup>46</sup> Sottolinear tat-Tribunal.

<sup>47</sup> Decizjoni appellata, fol. 112 tal-process. Sottolinear tat-Tribunal.

## Kopja Informali ta' Sentenza

provdut mis-socjetà Rikorrenti minnha originarjament deskritt bhala *non-deferred express service*, izda dan l-istess dritt ma jispettax ukoll lis-socjetà Rikorrenti fis-sens illi turi jew għall-inqas tipprova turi li minkejja d-deskrizzjoni moghtija dak izmien, bhala fatt is-servizz minnha provdut jaqa' entro l-parametri ta' *express mail service* kif imfisser fid-Decision 4 mahruġa mill-Awtorità intimata fid-Decizjoni pubblikata fil-25 ta' Marzu 2011. Fil-fehma tat-Tribunal dan l-atteggjament ta' l-Awtorità intimata jkompli jeffettwa b'mod negattiv il-validità u r-ragjonevolezza tad-decizjoni ta' l-istess Awtorità fil-konfront tas-socjetà Rikorrenti.

Mid-decizjoni appellata jirrizulta li l-Awtorità intimata tqis li s-servizz provdut mis-socjetà Rikorrenti ma jikkwalifikax bhala *express mail service* ukoll għaliex l-istess socjetà *does not ensure delivery within 24 hours after arrival in Malta*. Fir-Risposta ta' l-Appell tagħha l-Awtorità intimata amplifikat din ir-raguni bil-mod segwenti: *fil-paragrafu enumerat numru 10 tar-rikors ta' l-appell il-GPL targumenta li tat assigurazzjoni lill-Awtorità li hi fi zmien 24 siegħa mill-wasla ta' l-oggett postali f'Malta tagħmel il-kunsinna ta' l-istess. Fattwalment però jirrizulta li l-GPL imkien fit-terms and conditions tagħha mal-klijent ma tagħti tali assikurazzjoni*<sup>48</sup> *fejn allura tingħata rabta kontrattwali favur il-klijent li l-kunsinna issir fiz-zmien 24 siegħa mill-wasla ta' l-oggett postali f'Malta u jekk ma jigrix hekk, tikkompensa lill-klijent. Dak li hu kruċjali f'dan ir-rigward hu li wiehed jistabilixxi x'irbit hemm fir-realtà bejn l-GPL u l-klijent u mhux bir-rispett li wiehed juri – kif għamlet il-GPL – li fattwalment tali kunsinna kwazi dejjem issir fiz-zmien 24 siegħa mill-wasla ta' l-oggett postali f'Malta. In sostenn ta' l-argument tagħha l-GPL tagħmel referenza għad-dok GPL1 liema dokument juri biss istanzi fejn saret il-kunsinna fiz-zmien. Dan id-dokument però jonqos li juri jekk m'hemmx irbit bejn il-GPL u l-klijent fejn allura l-GPL f'kull okkazzjoni qed tintrabat li l-kunsinna dejjem issir fiz-zmien 24 siegħa mill-wasla ta' l-oggett postali f'Malta u jekk tali kunsinna ma ssirx tikkompensa lill-klijent koncernat. In oltre element importanti fir-rigward ta' guaranteed pre-set delivery time hu li garanzija ta' din ix-xorta għandha tkun akkumpanjata minn skemi ta' kumpens li japplikaw f'kaz li tali garanzija ma tigix onorata – haga li fil-kaz tal-GPL ma jirrizultax li jsir*<sup>49</sup>. Fin-Nota ta' Sottomissjonijiet Responsiva tagħha l-Awtorità intimata terġa' ttenni li l-GPL ma tagħti ebda garanzija, kif inhu rikjest, illi l-posta mibghuta bhala *express* minn barra u indirizzata lil xi hadd hawn Malta tigi mwassla lir-ricevitur ('addressee') f'Malta fi zmien 24 siegħa minn meta l-artiklu postali jasal Malta. Kif ġia sottomess hawn fuq, jirrizulta mill-provi mibjuba mill-GPL stess (ara dok. GPL1) li kien hemm kazijiet fejn fil-fatt dan l-obbligu ma ntlahaqx. Dan jikkonferma bis-shih il-konkluzzjoni tal-MCA fid-decizjoni appellata, b'mod partikolari para. 4.9(b) ta' l-istess decizjoni<sup>50</sup>

Huwa evidenti li hawnhekk l-Awtorità intimata qed tirreferi għall-*inbound mail* li skont Decision 4, pubblikata fid-Decizjoni tal-25 ta' Marzu 2011, biex titqies bhala li taqa' taht *express mail* jew ahjar *cross-border express mail* trid tkun *originating from a sender outside Malta and intended for delivery to Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal postal service and delivered within 24 hours after arrival in Malta*. F'dan ir-rigward it-Tribunal jagħmel referenza għal dak iktar 'l fuq osservat dwar il-mod għal kollox zbaljat kif l-Awtorità intimata kkunsidrat il-kwistjoni ta' l-*inbound*

<sup>48</sup> Enfasi ta' l-Awtorità intimata.

<sup>49</sup> Para. 3.1 sa' 3.3 tar-Risposta ta' l-Awtorità intimata, fol. 152 u 153 tal-process.

<sup>50</sup> Para. 65 u 66 tal-process.

## Kopja Informali ta' Sentenza

*service* provdut mis-socjetà Rikorrenti u b'mod partikolari dwar il-fatt li l-istess Awtorità naqset milli tikkonsidra bil-mod opportun il-fatt li għall-*inbound service* is-socjetà Rikorrenti qed tagixxi bhala agent jew rapprezentant tas-socjetà General Logistics Services u li għalhekk it-termini u kondizzjonijiet li kellhom jigu ikkunsidrati f'tali kuntest ma humiex tant dawk tas-socjetà Rikorrenti izda ta' General Logistic Services, li naturalment is-socjetà Rikorrenti hija marbuta bihom. Mill-gdid jigi mtenni li mill-*website* ta' General Logistics Services jirrizulta li l-istess kumpannija toffri lill-klijenti tagħha (i) *guaranteed delivery the next working day till close of business*; (ii) *transit times <24 hrs (excl. islands and peripheral areas)*; (iii) *additional service options available. TimeDefinite-Services Saturday-Service*; (iv) *Insurance up to €750 per parcel*; (v) *Permanent Tracking & Tracing incl. full delivery information*; (vi) *Money-Back-Guarantee*; u (vii) *One dedicated contact person for your Express dispatch* u kkunsidrata l-kwistjoni minn din il-perspettiva d-dokument Dok. "GPL1" ipprezentat mis-socjetà Rikorrenti flimkien mar-Rikors promotur, jiehu xejra u tifsira għal kollox differenti minn dik li tatu l-Awtorità intimata. In effetti d-dokument se mai jikkonferma li s-socjetà Rikorrenti hija marbuta, għaliex il-principal tagħha General Logistics Services a sua volta tkun hekk intrabtet mal-klijent tagħha – ossia s-*sender* ta' l-artiklu mertu tas-servizz – li jkun hemm il-konsenja fi zmien 24 siegħa mill-wasla ta' dak l-oggett Malta tant illi mill-istess dokument jirrizulta li fil-maggoranza preponderanti tal-kazijiet is-socjetà Rikorrenti effettivament tikkonsenja l-oggett fi zmien 24 siegħa – u f'certa kazijiet anke f'inqas zmien minn hekk – mill-wasla tiegħu hawn Malta.

Għalhekk għar-ragunijiet già iktar 'l fuq mogħtija fir-rigward ta' l-*inbound service* provdut mis-socjetà Rikorrenti t-Tribunal iqis id-decizjoni ta' l-Awtorità intimata fir-rigward ta' l-imsemmija socjetà bhala għal kollox zbaljata stante li l-Awtorità naqset milli tikkonsidra dawk il-fatturi u l-elementi realment u effettivament konnessi ma' dan is-servizz partikolari.

Skont l-Awtorità intimata fis-servizz tagħha s-socjetà Rikorrenti *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)*. Is-socjetà Rikorrenti tikkontesta din il-konkluzzjoni ta' l-Awtorità intimata u tikkontendi li s-servizz minnha provdut huwa mhux biss iktar spedittiv u affidabbli mis-servizz provdut mill-MaltaPost p.l.c. bhala *uniserval service provider* hawn Malta, talli għandu diversi *features* li s-servizz provdut mill-MaltaPost ma jagħtix. Fir-rigward ta' dawn il-*value added features* is-socjetà Rikorrenti tagħmel referenza għall-ittra li baġtet lill-Awtorità intimata fid-29 ta' Settembru 2011<sup>51</sup> u senjatament għall-iskeda annessa ma' din l-ittra fejn tindika dawk il-*features* li hija tipprovdi u li tqis bhala *value added features* fuq is-servizz tal-MaltaPost b'dana għalhekk li s-servizz minnha provdut huwa effettivament *express mail service*, u għad-dokument Dok. "GGGG1" a fol. 440 sa' 398 tal-process. Minn dawn id-dokumenti jirrizulta li l-*value added features* li is-socjetà Rikorrenti tikkontendi li tipprovdi huma: *we can collect packages on behalf of the customers from any country in the network and have it delivered to the customer in Malta. We can also move packages between countries in the network with the customer being in Malta and the packages never coming to Malta. Stopping, re-directing or returning packages while in transit*<sup>52</sup>; *customers can print shipping labels on their own premises 24/7, via web portal; each inbound*

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<sup>51</sup> Fol. 97 sa' 85 tal-process.

<sup>52</sup> Fol. 93 tal-process.

*shipment is checked against a manifest, scanned and time stamped*<sup>53</sup>. Dawn il-features kollha gew ikkonfermati minn Pierre Attard, rapprezentant tas-socjeta' Rikorrenti fix-xhieda li ta waqt is-seduta tal-21 ta' Jannar 2013<sup>54</sup>.

Fir-rigward tal-value added features l-Awtorità intimata tikkontendi li sabiex servizz postali jikkwalifika bhala express ghandu, b'zieda mar-rekwiziti hawn fuq imsemmija, ikollu fih karatteristici addizzjonali li ma jkollux servizz postali tal-universal service – “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”. Dawn il-karatteristici ghandhom ikunu tali li jkunu rilevanti ghall-utenti b'mod li ghalih ikunu “value added”. Dan huwa rifless anke fid-decizjoni appellata fejn l-Awtorità appellata kkonkludiet hekk: “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. ... <sup>10</sup> In line with the EU Postal Services Directive 2008/6/EC (Recital 27) 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. Illi skont in-Notice tal-Kummissjoni Ewropeja, l-added value ta' dawn il-karatteristici tas-servizz express ghandu jkun tali li l-utent ikun lest li jhallas aktar ghal dan is-servizz milli ghas-servizz tal-universal service. Kif spjega x-xhud Damian Gatt fl-affidavit tieghu, il-Commission Notice on the application of competition rules to the postal sector and on the assessment of certain State measures relating to postal services tghid proprju illi “Customers are in principle prepared to pay a higher price for this [express] service.”. Illi b'hekk l-ezercizzju li kellha taghmel, u li fil-fatt ghamlet, l-Awtorità appellata, kien li tevalwa jekk dawk il-value added features li s-socjeta' appellanti ddikjarat li huma tali, meta mehudin flimkien, kienux minn punto di vista ta' l-utent jaghmlu differenza sostanzjali bejn is-servizz tas-socjeta' appellanti u dak tal-universal service jew inkella z-zewg servizzi kienux ghall-utent inter-changeable to a sufficient degree. Illi skont dak li gie sottomess lill-Awtorità appellata mis-socjeta' appellanti, il-value added features tal-GPL kienu jikkonsistu f'tracking system fejn permezz ta' l-internet, utent jista' jsegwi t-tragitt ta' l-artiklu postali tul it-tragitt kollu, kif ukoll il-possibilita' li utent ibiddel id-destinazzjoni ta' l-artiklu postali f'kwalunkwe stadju qabel ma dan jasal ghand ir-ricevitur originali, flimkien mal-possibilita' li utent jipprintja x-shipping labels fil-premises tieghu stess bl-uzu ta' l-internet portal tan-network tal-GLS. Illi l-MCA hija tal-fehma, u b'hekk waslet ghall-konkluzzjoni mfissra fil-paragrafu 4.9(c) tad-decizjoni appellata, illi l-uniku value added feature li allegatament toffri l-GPL u li ma joffrix il-universal service tal-post hija dik tal-bdil ta' l-indirizz u destinazzjoni ta' l-artiklu postali waqt li l-istess artiklu ghadu fil-vjagg tieghu. Jinghad illi anke fir-rigward ta' dan l-added value feature il-Maltapost fl-obbligi taghha ta' universal service provider ghandha obbligu li toffri l-possibilita' li l-mittent ta' l-artiklu postali jista' jitlob li l-artiklu postali jigi ritrat mill-post jew li l-indirizz jigi mibdul jew korregut (withdrawal of postal articles from the post of where the address is altered or corrected) u redirection to other address, u dan jirrizulta anke mill-Appendix 01 (p. 35

<sup>53</sup> Dok. “GGGG1”, fol. 418 tal-process.

<sup>54</sup> Fol. 575 sa' 550 tal-process.

## Kopja Informali ta' Sentenza

u 36) tad-Decizjoni ta' l-MCA tal-25 ta' Marzu 2011. Dan juri kif l-MCA kienet saħansitra flessibbli fl-analizi tagħha fil-konfront tas-servizzi tal-GPL meta ikkunsidrat jekk dawn kienux jipprovdu valur mizjud għall-universal service għall-kuntrarju ta' l-istampa li tpingi l-GPL. Fl-istess mod, il-MaltaPost, bhala parti mill-obbligi imposti fuqha bhala universal service operator għandha l-obbligu li tipprovdi servizz registrat (registered mail) li jinkludi sistema ta' track and trace li permezz tagħha utent ikun jista' jsegwi l-artiklu postali tul il-vjagg tiegħu u jiccekkja fejn wasal l-istess artiklu postali. Dan isir regolarment fir-rigward ta' kull artiklu postali mibgħut bil-universal service tal-MaltaPost jekk jigi mitlub mill-mittenti ta' artiklu postali. ... Il-fatt li wiehed ikun irid jaqleb mis-sit elettroniku tal-MaltaPost għas-sit elettroniku tal-operatur barrani li jkun qed iwassal l-artiklu postali sa' għand ir-ricevitur barra minn Malta sabiex jittrackja l-vjagg ta' l-artiklu postali minn meta jasal għand dan l-operatur barrani, ma jfissirx li ma hemmx sistema ta' track and trace. Lanqas ma wiehed jista' jikkunsidra li l-fatt li l-utent irid jaqleb għal fuq is-sit elettroniku tal-operatur barrani sabiex jittrackja parti mill-vjagg fil-kaz tas-servizz universali tal-MaltaPost, filwaqt li allegatament ma għandux bżonn jagħmel l-istess għas-servizz tal-GPL, is-servizz tal-GPL għandu added value f'għajnejn l-istess utent tant li l-utent ikun lest li jhallas aktar għal dan is-servizz. ... L-istess jingħad għas-servizz li toffri l-GPL li l-utent allegatament ikun jista' jipprintja l-labels hu stess mill-post fejn ikun, flok dan isir mill-operatur. Oggettivament u mil-lenti tal-konsumatur dan ma jistax jingħad illi jikkostitwixxi added value tant li l-utent ikun lest iħallas aktar għal dan is-servizz tal-GPL.

Wara li qies is-sottomissjonijiet avanzati mill-Awtorità intimata in sostenn tad-decizjoni tagħha fil-konfront tas-socjetà Rikorrenti u x-xhieda ta' Damian Gatt dwar l-istess, it-Tribunal ma huwiex affattu konvint li d-decizjoni ta' l-Awtorità intimata fir-rigward hija wahda korretta. Ghalkemm fil-kaz ta' re-direction u withdrawal while in transit ta' l-artiklu postali huwa possibbli anke bis-servizz provdut mill-MaltaPost p.l.c., it-Tribunal ma jaqbilx li l-features l-oħra indikati mis-socjetà Rikorrenti ma jikkostitwixxux value-added features relattivi għas-servizz provdut minnha.

In kwantu rigwarda s-servizz ta' track and trace s-socjetà Rikorrenti ma hijiex qed tghid li dan ma huwiex offrut mill-MaltaPost kif donnha timplika l-Awtorità intimata fin-Nota ta' Sottomissjonijiet Responsiva tagħha izda tghid li s-servizz ta' track and trace provdut minnha huwa iktar utili għall-utent peress illi għandu l-informazzjoni kollha a disposizzjoni tiegħu mill-website tagħha u ma jsibx ruhu f'diffikultà biex jagħmel tracking and tracing ta' l-artiklu postali tiegħu una volta li dan jitlaq minn Malta kif inhu fil-kaz tas-servizz offrut mill-MaltaPost. Is-socjetà Rikorrenti ressqet prova – u mhux avanzat mera allegazzjoni kif tghid l-Awtorità intimata – li s-servizz ta' track and trace minnha provdut huwa all encompassing u disponibbli mill-website tagħha<sup>55</sup> filwaqt li s-servizz ta' track and trace provdut mill-MaltaPost p.l.c. għall-outbound services huwa applikabbli biss sakemm l-artiklu postali jkun għadu Malta. In effetti mill-estratt tal-website tal-MaltaPost esebit mis-socjetà Rikorrenti fid-dokument Dok. "GGGG1", senjatament a fol. 420 tal-process, jirrizulta ferm car id-disclaimer ta' l-istess MaltaPost li tracking information on registered mail, parcels or other trackable items may not be available on this website once an outgoing item has been dispatched from Malta. In such instances, kindly refer to the website of the receiving postal administration.

<sup>55</sup> Dok. "GGGG1" a fol. 423 sa' 421 tal-process.

## Kopja Informali ta' Sentenza

Ix-xhieda li ta Damian Gatt fir-rigward waqt is-seduta tat-23 ta' Ottubru 2012<sup>56</sup> tkompli tikkonferma u ssahhah il-konvinzjoni tat-Tribunal li dak affermat mis-socjetà Rikorrenti, u cioè li s-sistema ta' *track and trace* provdut minnha huwa ferm iktar utili ghall-utent minn dak provdut mill-MaltaPost, huwa minnu. In effetti fir-rigward ta' dan is-servizz Damian Gatt ghalkemm jghid li hemm kazijiet fejn in-numru moghti ghall-finijiet ta' *track and trace* jista' jibqa' l-istess ghaliex il-MaltaPost ikollha arrangament fir-rigward ma' l-operatur tal-pajjiz fejn ghandu jigi rekapitat l-artiklu postali, jghid ukoll li hemm kazijiet ohra fejn ma jkunx hemm tali arrangament u allura n-numru ma jibqax l-istess u l-utent tas-servizz ikollu jaghmel il-verifiki hu biex jottjeni dan in-numru. In risposta ghall-mistoqsija tat-Tribunal *jigifieri biex niftehm u jiena biex nibghat xi haga nuza t-tracking number u dan it-tracking number qed jaghtini Malta biss, it's up to me li imbaghad incempel u nara x'gara?* Damian Gatt jghid li *f'kaz tal-parcel post jekk immorru ghall-express li jipprovdiha then it's up to them. Però hemm pajjizi li it's interruptable and the Global universal service providers, jigifieri l-universal service providers li hemm fl-Ewropa u fid-dinja are moving to a harmonised same*<sup>57</sup>. Fil-fehma tat-Tribunal din l-ahhar kwalifika, ossia li *l-universal providers li hemm fl-Ewropa u fid-dinja are moving to a harmonised same* fir-rigward tas-servizz jew sistema ta' *track and trace*, turi bic-car li sa' llum – u certament fiz-zmien meta l-Awtorità intimata kienet qed taghmel l-investigazzjonijiet taghha fir-rigward tas-servizzi provduti mis-socjetà Rikorrenti – is-servizz ta' *track and trace* provdut mill-MaltaPost ma jistax jitqies bhala *interchangeable* mas-servizz ta' *track and trace* provdut mis-socjetà Rikorrenti.

Dwar is-servizz l-iehor li s-socjetà Rikorrenti tikkontendi li tipprovdi, u cioè li utent jista' jipprintja l-labels huwa stess mill-post fejn ikun minghajr ma jmur fl-ufficcju taghha, l-Awtorità intimata semplicement tghid li *oggettivamente u mill-lenti tal-konsumatur dan ma jistax jinghad illi jikkostitwixxi added value tant li l-utent ikun lest ihallas aktar ghal dan is-servizz tal-GPL* minghajr però ma taghti ebda forma ta' gustifikazzjoni ghal tali affermazzjoni ghad illi dan l-istess tip ta' servizz ma huwiex provdut mill-MaltaPost p.l.c.

Fir-rigward jibda biex jigi osservat li dan is-servizz irid jigi kkunsidrat fid-dawl ta' u flimkien ma' servizz iehor provdut mis-socjetà Rikorrenti dwar liema servizz l-Awtorità intimata konvenjentement ma qalet xejn, u cioè s-servizz ta' gbir ta' l-artiklu postali direttament minghand il-klijent. Ma hemmx dubju li fil-hajja mgħagħla w impenjattiva ta' llum utent ta' servizz postali jsib servizz li jippermetti il-gbir ta' artiklu postali lest bil-labels mehtiega mill-post fejn ikun minghajr ma jkollu ghalfejn imur fil-fergha ta' l-operatur innifsu, ferm konvenjenti w utili u fil-fehma tat-Tribunal dan is-servizz huwa tali li l-utent ikun lest ihallas xi haga zejda ghalih. Mix-xhieda ta' Damian Gatt jirrizulta li fil-prezent zgur ma huwiex possibbli li klijent tal-MaltaPost jipprintja *labels* relattivi ghall-artiklu tieghu mill-kumdità tal-post fejn ikun u ghalkemm artiklu postali jista' jingabar minghand l-utent dan, fi kliemu stess, jigi *at an extra cost* u allura t-Tribunal ma jistax jifhem kif servizz bhal dak provdut mis-socjetà Rikorrenti, li jaghti iktar mis-servizz *at an extra cost* tal-MaltaPost, ma jigix ikkunsidrat bhala *a value-added feature* fuq il-*universal postal service*.

Servizz iehor dwar liema l-Awtorità intimata konvenjentement baqghet ghal kollox siekta u ma qalet xejn huwa dak fejn is-socjetà Rikorrenti tikkontendi li tista' *also move packages between countries in the network with the customer being in Malta*

<sup>56</sup> Fol. 506 sa' 462 tal-process.

<sup>57</sup> Sottolinear tat-Tribunal.

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*and the packages never coming to Malta. Ghalkemm Damian Gatt ikkonferma li dan it-tip ta' servizz ma huwiex provdut mill-MaltaPost, l-Awtorità intimata naqset ghal kollox milli tikkunsidrah u ma qalet assolutament xejn fir-rigward.*

Fid-dawl ta' dan kollu osservat ghalhekk it-Tribunal ma jistax jifhem u addirittura lanqas jista' jaqbel ma' l-Awtorità intimata li s-servizzi addizzjonali provduti mis-socjetà Rikorrenti ma kienux, mill-punto di vista ta' l-utent, jaghmlu differenza sostanzjali bejn is-servizz provdut mis-socjetà Rikorrenti u l-*Universal Service* jew li addirittura dawn is-servizzi huma *interchangeable* mas-servizzi provduti mill-*Universal Service* u li *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*<sup>58</sup>.

Fid-decizjoni appellata l-Awtorità intimata kkonkludiet illi *in line with Decision 1 of the 25<sup>th</sup> 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. 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*<sup>59</sup>.

Decision 1 u senjatament il-paragrafi (1) u (3) – li huma rilevanti u pertinenti ghal din il-parti tad-decizjoni appellata - jipprovdu li *the following postal services would be considered to fall within the scope of the universal service: (1) A service which falls within the scope of the description of a service forming part of the universal postal service as defined in the Postal Services Act; ... (3) A service which, in the opinion of the MCA, 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 (as defined in Point 1 of this Decision 1). The MCA will also take into account the characteristics of the service being provided, including added value features as well as the intended use and the pricing.*

Is-socjetà Rikorrenti ma taqbilx mal-konkluzzjoni raggunta mill-Awtorità intimata u tikkontendi li s-servizz provdut minnha ma jistax jitqies li hu *interchangeable with a service that falls within the description of a service forming part of the universal postal service* peress illi s-servizz minnha provdut huwa mhux biss iktar spedittiv u affidabbli mis-servizz provdut mill-*Universal Service Provider* lokali, ossia l-MaltaPost p.l.c, talli fih *value-added features* li bla dubju ta' xejn jiddistingwuh minn tali servizz. Is-socjetà Rikorrenti rersqet il-provi relattivi in meritu ghall-fini li effettivament tipprova li s-servizz provdut minnha ma huwiex u ma jistax jitqies bhala *interchangeable* mas-servizz provdut mill-MaltaPost p.l.c. u ghamlet osservazzjonijiet ferm dettaljati fir-rigward fil-paragrafu 13 tan-Nota ta' l-Osservazzjonijiet taghha<sup>60</sup>.

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<sup>58</sup> Decizjoni appellata, fol. 113 tal-process.

<sup>59</sup> Decizjoni appellata, fol. 113 u 112 tal-process.

<sup>60</sup> Fol. 600 sa' 597 tal-process.

L-Awtorità intimata tirribatti ghal dawn l-affermazzjonijiet, provi u sottomissjonijiet tas-socjetà Rikorrenti billi tikkontendi li *l-ewwel rekwizit li ghandu jkollu express service skont id-Decizjoni numerata 4 tad-Decizjoni tal-25 ta' Marzu 2011, huwa li servizzi postali li huma express ghandhom ikunu "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."*<sup>61</sup> Isegwi ghalhekk illi jrid ikun hemm paragon bejn is-servizz postali tal-GPL u dak tal-**fastest standard category of the basic universal postal service**<sup>62</sup>. Bir-rispett kollu, tul l-appell odjern, il-GPL, b'mod emfatiku immens, ghamlet hiltha kollu sabiex taghti definizzjoni tat-terminologija **fastest standard category of the basic universal postal service**<sup>63</sup> li jaqbel lilha li jbidel is-sens kollu ta' dak li huwa rikjest mid-Decizjoni 4 tad-Decizjoni tal-25 ta' Marzu 2011. Illi huwa punt kardinali li ghandu jigi miftiehem sabiex tinghata applikazzjoni korretta tar-regolazzjoni tas-servizzi postali express li t-terminologija **m'hijex wahda suggesttiva izda hija wahda oggettiva**<sup>64</sup>. F'dak li ghandu x'jaqsam ma' posta domestika, u cioè posta mibghuta minn xi hadd fil-gzejjer Maltin lil xi hadd iehor fl-istess gzejjer Maltin, gie spjegat fid-Decizjoni tal-25 ta' MARzu 2011 (f'paragrafu 5.1 u footnote 73) li l-*"fastest standard category of basic universal letter post and parcel service relates to the USP's services subject to a next day delivery target (D+1)."* F'dak li ghandu x'jaqsam ma' cross border mail din id-definizzjoni tal-fastest standard category tohrog mill-Postal Directive ta' l-Unjoni Ewropeja numru 97/67/EC b'mod partikolari l-Annex II li tistabilixxi t-timeframes li postal items of the fastest standard category ghandhom ikollhom. ... Illi dan l-Annex II jistabilixxi illi s-servizzi li huma cross border, cioè bejn Stat Membru tal-Unjoni Ewropeja u iehor, u li huma stabbiliti fil-pajjiz fejn qed tigi impostata l-postal article bhala the fastest standard category, ghandhom jaslu fid-destinazzjoni ahharija taghhom, u cioè *"the point of delivery to the addressee"* fil-hinijiet li gejjin: 85% ta' dawn il-postal articles ghandhom jaslu fi zmien tlitt ijiem (running days) wara l-gurnata li fiha tkun giet impustata l-postal article (D+3); u 97% ta' dawn il-postal articles ghandhom jaslu imqar fi zmien hamest ijiem (running days) wara l-gurnata li fiha tkun giet impustata il-postal article (D+5). Ghalhekk dak li ghandu jinftiehem fid-Decizjoni 4 tad-Decizjoni tal-25 ta' Marzu 2011 huwa li servizz postali, sabiex jigi klassifikat bhala express, ghandu jkun fost l-ohrajn aktar mgħaggel minn dawn il-hinijiet imsemmija fil-paragrafu precedenti. Il-GPL stess, permezz tal-prezentazzjoni prodotta mix-xhud Pierre Attard, taghmel referenza specifika ghall-measurement criteria hawn fuq imsemmija u b'hekk tirrikonoxxi li l-kejl li fuqu jridu jigu mizurati d-delivery times ta' cross border mail huma dawk hawn fuq imsemmija u cioè *"85 percent of mail to be delivered within D+3 and 97 percent within D+5"*. Dan taghmlu b'referenza diretta ghad-decizjoni ta' l-MCA intitolata *"MaltaPost plc Quality of Service Targets and Requirements – Decision Notice (estratt ta' din tinsab fl-atti tal-process immarkat bhala Dok. DG2), fejn l-MCA imponiet fuq il-Universal Service Provider il-kundizzjonijiet dwar transit times, fost ohrajn ara p. 23 tal-prezentazzjoni tal-GPL esebita matul is-smigh ta' dan l-appell). Kif jirrizulta anke mill-prezentazzjoni ta' Pierre Attard (ara p.36) id-delivery obligations tal-Universal Service Provider f'Malta (f'dan il-kaz il-Maltapost) huma mnizzla fl-imsemmija decizjoni ta' l-MCA, u cioè **"MaltaPost Plc Quality of Service Targets and Requirements – Decision***

<sup>61</sup> Enfasi ta' l-Awtorità intimata.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Enfasi ta' l-Awtorità intimata.



**Notice<sup>65</sup>**, li kif jispjega sew l-istess Pierre Attard jirreplikaw l-obbligi dwar transit times li wiehed isib fid-Direttiva tal-Unjoni Ewropeja kif hawn fuq spjegat. Fid-Decizjoni tal-25 ta' Marzu 2011 hemm annessa tabella ta' l-obbligi tal-Universal Service fejn taghmel referenza ghad-decizjoni ta' l-MCA intitolata "**MaltaPost Plc Quality of Service Targets and Requirements – Decision Notice<sup>66</sup>**". Jirrizulta ghalhekk, bl-aktar mod car, u ghall-kuntrarju ta' dak kollu li pprovat targumenta l-GPL f'dan l-appell, illi l-kejl tas-servizz li qed jigi msejjah express m'huwiex mas-servizz l-aktar veloci li huwa attwalment provdut mill-universal service providers f'Malta (u cioè l-MaltaPost) izda proprju l-kriterji oggettivi mfassla fil-ligijiet taghna u fid-Direttiva ta' l-Unjoni Ewropeja hawn fuq imsemmija. Id-Decision 4 tad-Decizjoni tal-25 ta' Marzu 2011 taqra proprju hekk: "The MCA will use the definition below when determining whether a service can be classified as an express mail service, therefore falling outside the scope of the universal postal service. 1. Express mail services shall consist 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.**<sup>67</sup>" Il-kliem uzati huma "when compared to that of **the fastest standard category of the basic universal postal service**<sup>68</sup>" u mhux "when compared to **the fastest basic universal postal service actually offered on the market**<sup>69</sup>" jew "when compared to **the fastest basic universal postal service adopted by the universal service provider**<sup>70</sup>" jew frazi ohra simili. Ma tistax allura, bl-akbar rispet, il-GPL taghti xejra jew iterpretazzjoni ghal kollox differenti lil din il-frazi kardinali tad-Decision 4 tad-Decizjoni tal-25 ta' Marzu 2011, biex tipprova targumenta, ghalkemm lanqas hawn ma ghandha ragun, illi hi tipprovi servizz aktar mgħaggel u reliable ghal dak tal-**fastest standard category of the basic universal postal service**. Ghaldagstant kull paragon li taghmel il-GPL mas-servizzi tal-Maltapost biex turi li qed toffri servizz aktar spedittiv minn dak tal-Maltapost huwa inkorrett. Jekk, ghall-grazzja ta' l-argument biss, il-Maltapost mhijiex qed taderixxi ma' l-obbligi taghha ta' Universal Service Provider dan ma jfissirx li l-kejl f'dak li huwa timeframes u reliability ghas-servizzi express inbidel. Alla hares ikun hekk ghaliex kieku, bi ksur ta' l-obbligi ta' operatur wiehed jisfaxxaw is-servizzi kollha postali. Ghalhekk il-kejl huwa wiehed oggettiv u stabbilit fil-ligi. ... Ghall-kuntrarju ta' dak li l-GPL targumenta li missu sar, l-analizi li ghamlet l-MCA kien wiehed iffukat fuq is-servizzi li toffri l-GPL u r-rekwiziti li johorgu mill-ligi u d-decizjonijiet tal-MCA fir-rigward ta' dawn is-servizzi. L-analizi kienet wahda – jekk is-servizzi li kienet qed toffri l-GPL setghux jigu klassifikati bhala express jew le. Ghall-kuntrarju ta' dak li tghid u targumenta l-GPL, ma kienx hemm lok li jsir paragon bejn is-servizzi tal-GPL u dawk tal-Maltapost ghax is-sempli fatt li l-Maltapost hija l-universal service operator ma jaghmilx lill-Maltapost il-bazi tal-kriterju evalwattiv tas-servizzi postali f'Malta. L-obbligi u l-kriterji regolatorji huma stabbiliti fil-ligi u l-operaturi kollha, inkluz il-Maltapost, ghandhom josservaw dawn l-obbligi. L-obbligi u l-kriterji regolatorji ma jstabilixxuhomx l-operaturi. .... Id-Decision 4 imbaghad jispjega li "Cross-border express mail" jista'

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Enfasi ta' l-Awtorità intimata.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

*jkun ta' zewg tipi – Inbound – u cioè impostat minn barra Malta u destinat lil xi hadd f'Malta, jew Outbound – u cioè impostat f'Malta u destinat lil xi hadd barra minn Malta. Fiz-zewg kazijiet id-Decision 4 tghid hekk: “Cross border express mail means a postal article ... intended for delivery ... at a rate faster than **the published delivery standard for priority postal articles within the universal postal service**”<sup>71</sup>. Dan ikompli jefasizza l-punt li dak li huwa rikjest biex servizz postali cross-border jkun express huwa li s-servizz ikun aktar mgħaggel mid-delivery standard ippubblikat. Kif già imsemmi, id-delivery standard għal cross border mail jinsab ippubblikat fil-Postal Directive 97/67/EC, b'mod partikolari l-Annex II tagħha. B'hekk **l-uniku kejl** li fuqu trid tigi mizurata l-ispeditezza tas-servizz postali li qed jipprova jigi kwalifikat bhala express service huwa dan id-delivery standard ippubblikat fid-Direttiva imsemmija<sup>72</sup>.*

Wara li ra u kkonsidra dawn is-sottomissjonijiet ta' l-Awtorità intimata t-Tribunal ma jistax ma jhossux perpless u sa' certu punt anke turbat bil-mod kif issa l-istess Awtorità qed tapplika d-decizjoni appellata u qed tapplika u tinterpreta d-Decizjoni pubblikata fil-25 ta' Marzu 2011, inkluzi d-Decisions mogħtija fiha, u l-Annex II ta' Directive 97/67/EC.

Mis-sottomissjonijiet avvanzati mill-Awtorità intimata johrog ferm evidenti li llum l-istess Awtorità qed tikkontendi li s-socjetà Rikorrenti lanqas ma tikkwalifika taht l-ewwel rekwizit indikat fid-Decision 4 mogħtija fid-Decizjoni tal-25 ta' Marzu 2011, ossia dak ir-rekwizit li s-servizz minnha offrut huwa *a faster and more reliable acceptance/collection, handling, transportation and distribution of postal articles when compare to that of the fastest standard category of the basic universal postal service*, meta dan l-element bl-ebda mod ma jiffigura fid-decizjoni li ttiehdet fil-konfront ta' l-istess socjetà fil-15 ta' Dicembru 2011. In effetti mill-istess imsemmija decizjoni johrog ferm car li l-mankanzi ravvizati mill-Awtorità intimata fir-rigward tas-servizz provdut mis-socjetà Rikorrenti bhala *express mail service*, liema mankanzi wassluha għall-konkluzzjoni li s-servizz hekk provdut mis-socjetà Rikorrenti ma jistax jitqies bhala *express mail service* u addirittura huwa *interchangeable with a service that falls within the description of a service forming part of the universal postal service*, huma s-segwenti: (i) *does not provide guaranteed delivery times both with regard to its inbound and outbound mail services*; (ii) *does not ensure delivery within 24 hours after arrival in Malta*; u (iii) *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)*.

Imkien fl-imsemmija decizjoni ma jingħad xejn u wisq inqas ma hemm xi forma ta' konkluzzjoni kuntrarja għas-socjetà Rikorrenti dwar ir-rekwizit tal-*faster and more reliable acceptance/collection, handling, transportation and distribution of postal articles when compare to that of the fastest standard category of the basic universal postal service*. Tnejn mit-tlett mankanzi ravvizati mill-Awtorità intimata jiffiguraw fis-*supplementary characteristics* imposti mill-Awtorità *in addition to the greater reliability and speed throughout the supply of the service* sabiex servizz postali jista' jikkwalifika bhala *express mail service* u r-rekwizit imsemmi fil-paragrafu 4.9(b) jirrizulta mid-definizzjoni ta' x'inhu *cross-border express mail*. Fil-fehma tat-Tribunal għalhekk l-Awtorità intimata llum qed tqajjem mankanza jew ahjar

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<sup>71</sup> *Ibid.*

<sup>72</sup> Para. 13 sa' 26 u para. 30, 34 u 35 tan-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità intimata.

## Kopja Informali ta' Sentenza

allegata mankanza ohra fir-rigward tas-servizz provdut mis-socjetà Rikorrent, liema agir ma jistax jigi permess u wisq inqas assekondat minn dan it-Tribunal.

Bla pregudizzju ghal dak appena osservat u dato ma non concesso li l-konkluzzjoni ta' l-Awtorità intimata li s-servizz provdut mis-socjetà Rikorrenti *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* jista' jaghti lok ghal diskussjoni dwar l-ispeditezza tas-servizz provdut mill-imsemmija socjetà, it-Tribunal xorta wahda huwa tal-fehma li l-konsiderazzjonijiet maghmula w esposti mill-Awtorità intimata fin-Nota ta' Sottomissjonijiet Responsiva taghha huma zbaljati in kwantu ibbazati fuq interpretazzjoni skorretta kemm tad-Decizjoni tal-25 ta' Marzu 2011 kif ukoll ta' l-Annex II tad-Direttiva 97/67/EC.

Kuntrarjament ghall-interpretazzjoni li l-Awtorità intimata qed taghti ta' Decision 4 it-Tribunal huwa tal-fehma li l-paragun li jrid isir ghall-finijiet ta' dik id-Decision u skont dik l-istess Decision huwa gustament u appuntu bejn is-servizz provdut mill-MaltaPost p.l.c bhala *uniserval service provider*, stante li tali servizz effettivament jikkostitwixxi *the basic universal postal service*, u s-servizz provdut mill-entità sotto esami, f'dan il-kaz is-socjetà Rikorrenti. Li din hija l-interpretazzjoni li ghandha tinghata johrog ferm car mid-Decizjoni pubblikata fil-25 ta' Marzu 2011.

Fil-konsiderazzjonijiet li wasslu ghal Decision 4 l-Awtorità intimata osservat li *express mail sent through express mail or courier service providers are accelerated postal services (i.e. the expedited collection, transport and delivery of postal articles) characterised throughout by a degree of speed, tracking and managerial control throughout the supply of the service (i.e. from acceptance to delivery) that exceed that applied to the fastest standard category of the basic universal letter post and parcel service. An express mail service can be both local and cross-border<sup>73</sup>*. L-Awtorità intimata stess tikkjarifika li *the fastest standard category of basic universal letter post and parcel service relates to the USP's services subject to a next day delivery target (D+1). Refer to MCA's Decision on the QoS to be achieved by the USP published in 2010<sup>74</sup>*. Ladarba hawn Malta d-designated Universal Service Provider hija l-MaltaPost p.l.c. johrog ferm car li l-Awtorità stess qed tistabilixxi li s-servizz provdut mill-MaltaPost p.l.c. huwa *the fastest standard category of basic universal letter post and parcel service<sup>75</sup>* u allura kull fejn tuza l-frazi *the fastest standard category of basic universal service* necessarjament qed tirreferi ghas-servizz provdut mill-MaltaPost p.l.c. u dana anke ghall-finijiet ta' paragun.

Fir-rigward ta' *cross-border express mail* l-Awtorità kkunsidrat li *the MCA proposed that "cross-border express mail" should be defined as postal articles: originating from a sender in Malta and intended for delivery to a destination outside Malta at a rate faster than the published delivery standard for priority cross border postal articles dispatched by the USP<sup>76</sup>; originating from a sender outside Malta and intended for a delivery to Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal service<sup>77</sup> and delivered within the*

<sup>73</sup> Para. 5.1 tad-Decizjoni pubblikata fil-25 ta' Marzu 2011.

<sup>74</sup> Sottolinear tat-Tribunal. Footnote 73 tad-Decizjoni pubblikata fil-25 ta' Marzu 2011.

<sup>75</sup> *Ibid.*

<sup>76</sup> Sottolinear tat-Tribunal.

<sup>77</sup> *Ibid.*

*same working day of arrival in Malta*<sup>78</sup>. Hawn ukoll hija l-Awtorità intimata stess li qed tallaccja l-paragun li jrid isir mas-servizz attwalment provdut mill-*Universal Service Provider*, ossia l-MaltaPost p.l.c. Huwa veru li fir-rigward tad-definizzjoni ta' *inbound service* l-Awtorità ghamlet xi tibdiliet minn kif minnha originarjament propost izda din it-tibdil ma kienx fir-rigward tal-paragun li jrid isir izda limitament tifsira ahjar ta' x'ghandu jtifisser bil-frazi *delivery within the same working day*. Fir-rigward in effetti l-Awtorità intimata osservat li *the definition originally proposed by the MCA stated that only same day delivery services qualify as express services, for both local and inward cross-border express mail services, without clarifying what is meant by same day delivery. After having made the necessary considerations, the MCA is of the opinion that it would be appropriate to amend the definition to define better what is meant by "delivery within the same working day"*<sup>79</sup>.

B'hekk l-uniku mod kif ghandha tinqara u konsegwentement tigi interpretata Decision 4 moghtija fid-Decizjoni pubblikata fil-25 ta' Marzu 2011 huwa fid-dawl tal-konsiderazzjonijiet maghmula mill-Awtorità intimata f'dik l-istess Decizjoni u fejn fid-Decision 4 tistabilixxi li *express mail services consist 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* u li *cross border express mail means a postal article: originating from a sender in Malta and intended for delivery to a destination outside Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal postal service* u *originating from a sender outside Malta and intended for delivery to Malta at a rate faster than the published delivery standard for priority cross border postal articles within the universal postal service and delivered within 24 hours after arrival in Malta*, il-paragun necessarjament irid isir **mas-servizz attwalment provdut mill-Maltapost p.l.c.** u mhux kif qed targumenta l-Awtorità intimata ma' dak dispot fl-Annex II tad-Direttiva 97/67/EC.

L-Awtorità intimata ma tistax tinjora l-konsiderazzjonijiet fuq liema bbazat id-Decizjoni pubblikata fil-25 ta' Marzu 2011 u d-*Decisions* relattivi moghtija fiha u minflok illum, ghall-fini li tipprova tiggustifika d-decizjoni appellata fil-konfront tas-socjetà Rikorrenti, tipproponi konsiderazzjonijiet ghal kollox godda a bazi ta' liema skontha ghandha tigi interpretata l-imsemmija Decizjoni pubblikata fil-25 ta' Marzu 2011 u senjatament Decision 4 promulgata fiha.

Mill-provi prodotti rrizulta li ghall-finijiet ta' *cross border mail* il-MaltaPost p.l.c. ma tippubblikax id-delivery standard taghha ghal *priority cross border postal articles* u ghalhekk gustament is-socjetà Rikorrenti tistaqsi fuq liema bazi l-Awtorità intimata waslet ghall-konkluzzjoni taghha li s-servizz provdut mis-socjetà Rikorrenti fir-rigward ta' *cross border mail* ma huwiex *express mail service* u addirittura huwa *interchangeable with a service that falls within the description of a service forming part of the universal postal service*. Min-Nota ta' Sottomissjonijiet Responsiva ta' l-Awtorità intimata huwa evidenti li tilqa' ghal din il-kontestazzjoni tas-socjetà Rikorrenti billi tghid illi l-parametru applikabbli, u dak minnha effettivament applikat fil-konfront tas-socjetà Rikorrenti, huwa dak dispot fl-Annex II tad-Direttiva 97/67/EC. Apparte l-fatt li t-Tribunal ma jaqbilx ma' din il-veduta ta' l-Awtorità intimata, iqis li l-analizi li hija ghamlet biex tasal ghall-konkluzzjoni

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<sup>78</sup> Pagna 26 tad-Decizjoni pubblikata fil-25 ta' Marzu 2011.

<sup>79</sup> Pagna 29 tad-Decizjoni pubblikata fil-25 ta' Marzu 2011.

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taghha hija fi kwalunkwe kaz zbaljata ghalix interpretat dak provdut fl-imsemmi Annex b'mod ghal kollox zbaljat.

Fin-Nota ta' Sottomissjonijiet Responsiva taghha tghid li *f'dak li ghandu x'jaqsam ma' cross border mail din id-definizzjoni tal-fastest standard category tohrog mill-Postal Directive ta' l-Unjoni Ewropeja numru 97/67/EC b'mod partikolari l-Annex II li tistabilixxi t-timeframes li postal items of the fastest standard category ghandhom ikollhom. ... Illi dan l-Annex II jistabilixxi illi s-servizzi li huma cross border, cioè bejn Stat Membru tal-Unjoni Ewropeja u iehor, u li huma stabbiliti fil-pajiz fejn qed tigi impostata l-postal article bhala the fastest standard category, ghandhom jaslu fid-destinazzjoni ahharija taghhom, u cioè "the point of delivery to the addressee" fil-hinijiet li gejjin: 85% ta' dawn il-postal articles ghandhom jaslu fi zmien tlitt ijiem (**running days**<sup>80</sup>) wara l-gurnata li fiha tkun giet impustata l-postal article (D+3); u 97% ta' dawn il-postal articles ghandhom jaslu imqar fi zmien hamest ijiem (**running days**<sup>81</sup>) wara l-gurnata li fiha tkun giet impustata il-postal article (D+5). Ghalhekk dak li ghandu jinftiehem fid-Decizjoni 4 tad-Decizjoni tal-25 ta' Marzu 2011 huwa li servizz postali, sabiex jigi klassifikat bhala express, ghandu jkun fost l-ohrajn aktar mghaggel minn dawn il-hinijiet imsemmija fil-paragrafu precedenti.*

Nonostante dak osservat mill-Awtorità intimata dwar il-parametru minnha applikat biex tqis in-natura jew ahjar l-ispeditezza tas-servizz cross-border provdut mis-socjetà Rikorrenti, minn semplici qari ta' l-Annex II tad-Direttiva 97/67/EC jirrizulta immedjatament evidenti li l-istess Direttiva ma titkellimx dwar **running days** izda dwar **working days** u in effetti tipprovdi li *the quality standards for intra-Community cross-border mail in each country are to be established in relation to the time limit for routing measured from end to end for postal items of the fastest standard category according to the formula D + n, where D represents the date of deposit and n the number of working days which elapse between that date and that delivery to the addressee*<sup>82</sup>. Minn dan johrog car li l-parametru applikat mill-Awtorità huwa ghal kollox zbaljat bil-konsegwenza ghalhekk li il-konkluzzjoni raggunta minnha fir-rigward tas-servizz provdut mis-socjetà Rikorrenti hija kompletament erroneja.

It-Tribunal huwa tal-fehma li d-decizjoni ta' l-Awtorità intimata fil-konfront tas-socjetà Rikorrenti, komunikata lill-istess socjetà bl-ittra datata 15 ta' Dicembru 2011, hija nieqsa mill-legittimità u ragjonevolezza u konsegwentement ma ghandhiex u ma tistax tigi kkonfermata. Huwa principju assodat fid-Dritt Amministrattiv li Awtorità pubblika ghandha tezercita d-diskrezzjoni taghha b'mod ragjonevoli u jekk tali ragjonevolezza tkun nieqsa fl-agir ta' l-Awtorità pubblika, bhalma huwa l-kaz fil-kaz in ezami, id-decizjoni eventwali moghtija minn dik l-Awtorità pubblika ghandha tigi annullata.

Fir-rigward issir referenza ghal dak osservat fil-ktieb "**Administrative Law**"<sup>83</sup> dwar *the rule of reason: a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the*

<sup>80</sup> Enfasi tat-Tribunal.

<sup>81</sup> *Ibid.*

<sup>82</sup> Enfasi tat-Tribunal.

<sup>83</sup> H.W.R. Wade & C.F. Forsyth, 10<sup>th</sup> Edition.

*use of his reason, ascertain and follow the course which reason directs. He must act reasonably*<sup>84</sup>. ... *It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'*<sup>85</sup>. *Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of authority. Warrington LJ in Short v. Poole Corporation gave the example of the red-haired teacher dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might also be described as being done in bad faith; and, in fact, all these things run into one another. ... The rule of reason has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self misdirection, or addressing oneself to the wrong question*<sup>86</sup>.

Fid-dawl ta' dan kollu osservat it-Tribunal iqis li l-appell tas-socjetà Rikorrenti mid-decizjoni ta' l-Awtorità intimata komunikata lilha b'ittra datata 15 ta' Dicembru 2011 huwa gustifikat u jisthoqq li jigi milqugh. Ghaldaqstant a tenur tas-setgha moghtija lilu bis-sahha ta' l-Artikolu 39 tal-Kap.418 tal-Ligijiet ta' Malta, it-Tribunal ser jghaddi biex jannulla *in toto* l-imsemmija decizjoni ta' l-Awtorità intimata fil-konfront tas-socjetà Rikorrenti.

Ghal dawn ir-ragunijiet it-Tribunal jaqta' u jiddeciedi l-kawza billi jilqa' l-appell interpost mis-socjetà Rikorrenti mid-decizjoni ta' l-Awtorità intimata komunikata lilha b'ittra datata 15 ta' Dicembru 2011 u jannulla *in toto* l-imsemmija decizjoni ta' l-Awtorità intimata fil-konfront tas-socjetà Rikorrenti.

Ai termini ta' l-Artikolu 39(2) tal-Kap.418 tal-Ligijiet ta' Malta t-Tribunal jordna li l-ispejjez ta' dawn il-proceduri jigu sopportati interament mill-Awtorità intimata.

Ai termini ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta t-Tribunal jordna li din id-decizjoni tigi komunikata lis-socjetà Rikorrenti u lill-Awtorità intimata.

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<sup>84</sup> Pagna 295. Sottolinear tat-Tribunal.

<sup>85</sup> *Ibid.*

<sup>86</sup> Pagni 303 u 304. Sottolinear tat-Tribunal.

**< Sentenza Finali >**

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