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Date: 3 December 2018

Submissions and Representations of DHL International (Pty) Ltd (“DHL Express”) in Response to the Invitation for Written Submissions Published by the Independent Communications Authority of South Africa under Notice 1000 of GGN. 41928 of 28 September 2018

1. We refer to the Notice of Intention to Conduct an Inquiry into the unreserved postal service issued by the Independent Communications Authority of South Africa (“**ICASA**”) pursuant to Notice 1000 of GGN. 41928 of 28 September 2018 (the “**Notice**”) as well as the discussion document issued pursuant thereto (the “**Discussion Document**”).
2. While the submission of the South African Express Parcel Association (“**SAEPA**”) includes a fair representation of our views in response, we wish to further place on the record our position as DHL Express, through this submission.
3. We believe that any response regarding the Regulations and their effectiveness that are made in isolation, without reference to the large regulatory context, would not adequately represent our position. Accordingly we wish to first elaborate on our views on the current regulatory context, which frames our responses to the specific questions of ICASA.
4. We note that under the Postal Services Act 124 of 1998 (the “**Postal Services Act**” or the “**Act**”), the objectives of the Postal Services Act include to:
 - a. (b) promote the provision of a wide range of postal services in the interest of the economic growth and development of the Republic;
 - b. (d) encourage investment and innovation in the postal industry;
 - c. (j) ensure fair competition within the postal industry;
 - d. (l) protect the interests of postal users and consumers; and
 - e. (p) ensure compliance with international commitments.

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5. Our primary view is that courier and post are very distinct industries and should be treated as such. Courier companies, being private enterprises, are susceptible to market forces and are therefore effectively regulated by the market. Consumers can, and do, vote with their feet, and if a courier company does not provide a good enough service it may very well have to close down. However, the national postal operator is a very different kind of entity, having recourse to public funds and privileges that derive from the Universal Postal Union (the “**UPU**”). There is no true “level playing field” between the national postal operator and courier companies, because the national postal operator enjoys benefits and privileges that courier companies could never access. This is the rationale underlying why a national postal operator is the appropriate entity through which public sector aims, such as universal service and affordable standard letter delivery, are to be achieved.
6. Naturally, public-sector aims carry with them challenges, which we are not unsympathetic to. However, as private enterprises, courier companies already pay taxes, towards the achievement of public aims generally. Moreover the services they provide contribute to economic growth. Usually, where a government requires a private company to carry out investment and works for public benefit, this is done as a Public-Private-Partnership where the company gets compensated. Obliging private companies to contribute to for public aims as a quid-pro-quo for being allowed to operate, is very far from what would be expected in a modern and forward-thinking economy.
7. In terms of required regulation, market forces act as a power regulatory influence. On a day-to-day basis, the key concern of maintaining and growing our customer base drives us, and the constant fear of losing our customers to other market players in a competitive market keeps the courier industry very motivated to provide exemplary service at all times.
8. The GATS obligations of the Republic of South Africa in regards to courier services include no limitations on market access or national treatment. This is yet further reason why the direction of regulation of the courier industry should be towards liberalization, not yet further restrictions and burdens.
9. However, if the courier market is going to be treated as part of the postal industry, and regulated as such, then such regulation should be promulgated in line with the legislative objectives recorded in the Act. Applying legislative interpretations that carve out monopolies for a postal operator that include services that are typically provided by or developed by courier companies, or impose onerous obligations on private courier companies, is not in keeping with the principles of fair competition, reduces choice for consumers, and stifles the provision of a wide range of courier services, which in turn has a potential negative impact on the economic growth of the republic. Monopolies which impact the courier market would also not be in line with South Africa’s GATS obligations.
10. The submission of SAEPA expands in detail the concerns posed by the interpretations placed on the “reserved” and “unreserved” postal services in the current regulatory context, and the distortions and concerns that arise as a result. We fully echo these concerns. The push towards an interpretation

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of the Postal Services Act to the effect that the postal operator has a monopoly to carry any items up to 1 kg gives rise to an interpretation that is in direct contradiction to a number of core objectives in the Postal Services Act.

11. We have seen the recent Postal Services Amendment Bill (the “**Amendment Bill**”) and note that under it, “reserved services” and “unreserved services” are undefined, and to be determined by the Minister. This would appear to introduce an element of uncertainty into the legislative process. For this reason we consider that the representations on the current regime remain valid. A postal monopoly should properly reflect those items which a national postal administration, falling under the auspices of the UPU, is tasked with achieving, with recourse to public funds. Ideally this should be set out and specified, without leaving open the door for potential expansion of monopolies into areas in which private companies already operate effectively, regulated by market forces.
12. For example, the provision of “SWIP boxes” is a measure to allow collection of deliveries from collection lockers, effectively introducing automation into the process where otherwise there would have to be a manned location. The “reserved” sector definition should allow for healthy innovation along these lines.
13. A further concern is that obligations imposed on courier companies should be proportionate and commercial. There appears to be a move in the Amendment Bill to introduce a requirement for insurance to be provided subject to “terms and conditions determined in the Short-Term Insurance Act”. We are strongly of the view that there is no need for a mandate that a courier company offer *insurance*, insofar as any insurance product would be subject to the heavily regulated insurance market. A more sensible and appropriate requirement would be that courier companies offer:
 - a. Additional or enhanced liability;
 - b. Against an increased fee; and
 - c. On terms agreed with the customer.Particularly if this is to be imposed on a mandatory basis (which we do not object to *per se*), the product that courier companies should be made to offer should align to what it can offer to its general consumer base as effective protection.
14. A further critical point of concern regards limitations of liability; these again are usually predicated upon the agreement between the operator and the customer, in line with what reasonable risk the operator can be expected to shoulder for the remuneration tendered. The Montreal Convention and Warsaw Convention, to which the Republic of South Africa is a signatory, reflect these principles in terms of cargo liability. It is submitted that these conventions, and the principle of freedom of contract, should be allowed to continue to operate as they do at present.
15. In addition to South Africa’s GATS commitments, South Africa also signed a Treaty concerning the Reciprocal Encouragement and Protection of Investments with Germany (the “**Treaty**”) in September 1995, and although it was terminated in 2013, under its provisions it continues to be effective with

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respect to pre-termination investments for a further period of 20 years from the date of termination. The Treaty provides that each country shall promote investments by nationals or companies of the other country and accord them fair and equitable treatment. It further provides that a country may not impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in the other country. Again, the principle of adherence to international commitments – including the principle of encouragement of foreign direct investment – is not aligned with measures that are likely to disproportionately impact courier companies with foreign shareholders.

16. Within the context of these comments, we provide our responses to the questions in the Discussion Document. As mentioned, the submission of SAEPA also reflects our views and so we will refrain from repetition of points already covered in that document.

Question 1: In your view do the Regulations achieve the objectives as stipulated in Section 2 of the PSA? Please elaborate using table below.

Objects of The Act	Yes/No	Elaborate
promote the provision of a wide range of postal services in the interest of the economic growth and development of the Republic.	No	As we have elaborated above, the wider regulatory context - both in the current regulatory regime and the one proposed in the current version of the Amendment Bill – poses unnecessary obstacles to the courier industry, and in the achievement of this object in the Act.
make progress towards the universal provision of postal services;	n/a	As we have indicated above, this aim should not apply to private unreserved postal service operators.
encourage investment and innovation in the postal industry;	No	As per our response above.
promote the development of postal services that are responsive to the needs of users and consumers;	No	As per our response above.
ensure fair competition within the postal industry;	No	As per our introductory comments above.
promote stability in the postal industry;	No	As per our response above.
protect the interests of postal users and consumers;	No	As per our introductory comments above.

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promote small, medium and microenterprises within the postal industry.	No.	As per our introductory comments above.
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Question 2: What do you think are the contributing factors to the declining numbers of registered operators?

We can only speculate as to why the numbers of registered operators have declined. This could be due to market challenges (contributed to by ambiguities and difficulties in the regulatory environment), or could be due to the operation of market forces, which are the biggest determinant of a courier company's operational viability.

Question 3: The section above provides the definition for unreserved postal services as described by the PSA, do you find the above definition enough for the current operations? Please elaborate.

As we have stated above, we consider that the definition of "reserved postal services" is the one that should be made certain and specific, and limited in clear and unambiguous terms to the specific products that a national postal administration typically offers, leaving private enterprises to offer market-driven alternative service offerings to the consumer.

In this vein, we should mention that we see e-commerce is an avenue for national growth, whose rapid expansion was contributed to by courier companies. Consumers want end-to-end tracking of their parcels – this is something built into the courier model, while a national postal operator might not be able to replicate the same model without considerable investment. The courier industry welcomes competition; however the competition should be fair, without imposition of monopolies, or the requirement that courier companies contribute to or support the postal operator as a competitor in the courier field.

Question 4: Section 22 (d) (ii), (iii), (iv) provides that a person considered to provide courier services undertakes to provide track and trace, deliver within a timeframe. Should the Authority intervene in setting and monitoring delivery standards (in terms of track and trace system, and time deliveries) for unreserved operators? Please Elaborate.

We consider there is little need for the Authority to impose statutory standards for what is essentially a market-driven feature. Consumers should be allowed to choose products at price levels that suit them, which may have differing time frames for delivery.

A courier company that routinely fails to provide the service that is purchased already faces loss of customers, reputation and ruin; it would be a waste of resources to monitor this metric.

Question 5: Do you believe that the current application procedure is efficient? Please elaborate on your answer.

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We consider the current licensing regime is sufficient but should indicate that this is based on the current licensing regime not imposing upon courier operators an obligation (actual or monetary) with respect to the public sector aim of universal service, or a licence fee that represents more than the proportional administrative costs of monitoring the industry, calculated in line with the employment costs for regulatory personnel.

Question 6: Do you believe that the current 3-year license validity period is sufficient for business purposes? Please elaborate.

We have no objections to the 3-year licence period provided that the licence fees remain commensurate and proportional, and, crucially, a fixed amount that represents the actual administrative costs and that is the same for all licencees.

A fee that is capable of fluctuation is difficult to plan for, and a fee that is expressed to be a percentage of a company's revenue would, in our view, be manifestly uncommercial. Companies that are able to offer consumers the best service would naturally grow in size, and this in itself should not be a reason for the same company, operating in an intensely competitive environment, to pay higher licence fees. A fee that is calculated as a percentage of revenue would amount to more successful companies subsidising the costs of regulating the other market players, and effectively being punished for their success.

Question 7: Considering the licensing framework above, which licence conditions should the Authority consider distinguishing between licensing categories?

We do not see why there should be separate processes and fees for courier companies based on their size and scale, for the reasons we have mentioned above in response to question 7.

Question 8: Do you believe that the prescribed fees are economically feasible for all Operators? Please elaborate and provide suggestions on how the Authority should prescribe registration fees using the table below?

See our response to question 7.

Question 9: Considering the licence categories prescribed by the white paper, how should the Authority differentiate licence fees payable? Please elaborate.

See our response to question 7.

Question 10: Do you find the Authority's monitoring and enforcement of the unreserved postal services effective? Please elaborate your answer and make suggestions in this regard.

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As stated above, we believe that market forces are already a powerful regulator for the courier industry. Bearing in mind the GATS obligations of the Republic of South Africa, we believe there is a real and substantial imperative to push towards further liberalization of the courier market.

Question 11: Do you think the Authority should impose an obligation for registered operators to report, unregistered to improve compliance? Please elaborate.

This would seem to be unnecessary and inappropriate in the context of a market-driven courier industry.

Question 12: Do you consider the prescribed penalty fee suitable? Please elaborate on your answer.

The rationale for imprisonment as a potential penalty is unclear. In our view penalties should be proportionate to the level of the infraction, actual damages suffered to third parties, and intent. Provided these principles are adhered to in actual levies, a penalty system extending up to R 250,000 would appear reasonable.

Question 13: Kenya has a condition that at least 20% ownership of unreserved postal operators should be local (Kenyan), Should the Authority impose local ownership and control as part of licensing condition for unreserved postal operators? Please Elaborate.

We consider that imposition of ownership requirements of courier companies, separate to ownership requirements on commercial enterprises generally, would be contrary to the GATS obligations of the Republic of South Africa in relation to courier companies. It could also have a chilling effect on needed FDI and investment from abroad, when, if anything, there should be more initiatives promoting connections and networks between South Africa and the international market.

We note that in page 45 of the Discussion Document that it has been observed that Malaysian and Kenyan regulators do not oblige unreserved postal operators to pay the universal service fee. Certainly this should, in our view, be the approach that is adopted in South Africa both now and in the future.

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