



# **SUBMISSIONS BY THE SOUTH AFRICAN EXPRESS PARCEL ASSOCIATION. 29 NOVEMBER 2018**

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**Submissions and Representations 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.**



## Introduction

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 (the "**Authority**") under Notice 1000 of GGN. 41928 of 28 September 2018 (the "**Notice**") as well as the discussion document issued pursuant thereto.
2. These representations are submitted by the South African Express Parcel Association ("**SAEPA**") in its own right and with the collective input of its members. This being said, no submissions made in these representations should be taken to be made to the prejudice of our members' right to make additional representations to the Authority in their individual stead. . SAEPA is an industry organization with a membership of over 100 members which are active in the express freight, courier and parcel delivery market. SAEPA's membership includes large multinational operators as well as local operators of varying sizes throughout the freight and parcel delivery supply chain.
3. SAEPA was constituted by its members to advance the interests of the express freight, courier and parcel delivery industry in South Africa for the benefit of consumers, service providers, regulators and the South African economy at large. SAEPA has indeed had various recent engagements with the Authority in relation to the postal services industry in general and in particular, the unreserved postal service, with a view to assisting the Authority to fully understand market dynamics in order to effectively regulate the market. Given SAEPA's expansive membership, it has grown to become a strong representative voice on issues relating to the express freight and courier markets.
4. Accordingly, SAEPA and indeed its individual members are key stakeholders in the "postal services" market and have a real and substantial interest in the regulation of the unreserved postal service in South Africa. SAEPA therefore trusts that these representations will be given adequate consideration by the Authority. SAEPA has consistently shown in its previous engagements with the Authority that it is committed to the effective and equitable regulation of the postal services market and welcomes any initiative in pursuance of this objective. Accordingly, to the extent that the Authority resolves to hold public hearings in relation to this inquiry, SAEPA would be grateful to receive notice of any such intention and an invitation to participate in any such public hearing.
5. We note that the Authority's main objective to provide its initial analysis on what, in its view, are the main regulatory issues affecting participants in the unreserved postal services market and to solicit market participants' views in relation to the regulatory barriers in the market. We note that the



Authority poses several questions to participants in relation to regulation of the market and in respect of various topics. Our submissions will respond to the individual questions posed by the Authority. However, over and above responding to the specific questions, we intend to provide comments in relation to other sector specific issues which are not addressed in any great detail by the discussion document including for example, the universal service obligation, the establishment of a universal service fund, and the ambit and regulation of the reserved postal service.

6. We will provide responses to the Authority's specific questions later in these representations. However, as a starting point, SAEPA believes that the biggest regulatory hurdle to providers in the postal services market is a long standing lack of clarity as to what precisely constitutes the reserved and unreserved postal service envisaged by the Postal Services Act 124 of 1998 (as amended) (the "**PSA**") and which entities may operate in this sector and therefore fall within the Authority's jurisdiction. This uncertainty has led to a number of issues and disputes in the market, and we are confident that it is the single biggest cause of the high number of unregistered unreserved service operators identified by the Authority in the discussion document.
7. The issue of the ambit of reserved and unreserved postal services respectively has been the subject of dispute between various key market stakeholders since 2001. As you will recognize, ambiguity in the application and interpretation of any regulations has the potential to stifle investment and growth in any sector as a result of investor anxiety in relation to their rights of tenure in the market. The overwhelming majority of our members operate in the unreserved postal services and have therefore been subject to this anxiety in relation to their existing businesses and goodwill for the better part of almost 20 years.
8. It is with this background that we also made submissions to the Department of Telecommunications and Postal Service in response to its own call for comments in relation to the Postal Services Amendment Bill, 2017, to highlight this exact issue and propose legislative amendments which in our view, would provide the requisite clarity and resolve certain of the issues faced by market participants on the one hand, and aid the Authority in the performance of its regulatory duties on the other.
9. As you may glean from our preceding comments, the central regulatory barrier in the unreserved postal service relates pertains to the PSA's definition of the reserved and unreserved postal service respectively, which is discussed in Section D of the discussion document. We will address this issue first and thereafter respond to the Authority's specific questions.



## DEFINITION OF THE RESERVED AND UNRESERVED POSTAL SERVICE

10. We note that the discussion document's focus is the unreserved postal service. With respect, however, we submit that in order to fully understand the ambit of the unreserved postal service as envisaged by the PSA, it is important to read it with the context of what the PSA envisages to constitute the ambit of the reserved postal service. The PSA currently defines the reserved and unreserved postal service with reference to Schedules 1 and 2 of the PSA respectively.
11. Schedule 1 sets out the definition of the "reserved postal service" and provides that:
- "(1) The reserved postal services include -*
- (a) all letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set out in item 3;*
  - (b) issuing of postage stamps; and*
  - (c) the provision of roadside and collection boxes."*
12. The mass and size limitations referred to in subparagraph (a) of paragraph 1 to Schedule 1 essentially describe postal items that weigh less than 1 kg and are approximately smaller than a standard size briefcase.<sup>1</sup>
13. Schedule 2 on the other hand provides a definition for the unreserved postal service and provides that:
- "(1) Unreserved postal services include -*
- (a) all letters, postcards, printed matter, small parcels and other postal articles that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms;*
  - (b) courier services in respect of items mentioned in paragraph (a); and*
  - (c) any other postal service that falls outside the ambit of the reserved services as set out in Schedule 1."*
14. Both schedules then proceed to exclude certain activities which relate to the conveyance of postal articles by persons that do not convey postal articles in the ordinary course of business, as well as the

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<sup>1</sup> Paragraph 3 of Schedule 1 prescribes that the reserved postal services includes postal items of a mass of up to and including 1 kg, which enables it to fit into a rectangular box that is 458 mm long, 324 mm wide and 100 mm thick.



conveyance of certain identified articles<sup>2</sup> from the ambit of "postal services". From a first glance of the two definitions above, one is immediately confronted with a lack clarity in respect of the PSA as the introductory statement of both schedules is almost identical in that they provide in relation to both the reserved and unreserved postal services that they include "*all letters, postcards, printed matter, small parcels*". The wording that follows this phrasing in Schedule 2 in particular is the cause of the aforementioned uncertainty in that it provides that the unreserved postal services includes the items described above "*and any other postal articles that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms...*" (*our emphasis*).

15. It is not at all apparent from the Schedules to the PSA what is envisaged by the "ambit of the reserved postal service". This is unfortunately also not explained anywhere else in the PSA. This has led to confusion and uncertainty on the part of market participants and simply been interpreted by certain market participants (erroneously in our view) to mean that the conveyance of sub 1 kilogram postal articles that can fit within a briefcase is within exclusive statutory monopoly of the sole reserved postal services licensee in South Africa which is currently the South African Postal Service SOC Limited ("**SAPO**"). This interpretation unfortunately seems to have been adopted within the discussion document as well.<sup>3</sup>
16. However, as we have consistently stressed to the Authority and as now observed by the Authority's review of the market,<sup>4</sup> this position is simply not reflective of reality, and in any event is not tenable based on the plain wording of the relevant provisions of the PSA and is accordingly by no means a reflection of the PSA's provisions. The Legislature's intention, when promulgating the PSA, was plainly that both the reserved and unreserved postal operators could convey sub 1 kilogram items - to suggest otherwise makes nonsense of the fact that drafters of the legislation very specifically mention letters and postcards (for example) in Schedule 2 of the PSA as falling within the unreserved service. They did not intend to refer only to letters that weigh more than a kilogram (which would be at least 200 A4 pages in length) or to a postcard larger than a brief case. Neither such item even exists. It is not permissible in our law to apply a meaning to the plain wording of statutes which yields a nonsensical result.
17. The National Integrated ICT Policy White Paper, 2016 ("**White Paper**") whose objectives include, inter alia, the provision of "*a definition of postal services and the scope of the sector*" and the

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<sup>2</sup> i.e. unaddressed mail, legal process, affidavits, depositions, trade announcements, circulars, printed extracts from newspapers, unaddressed advertisements, newspapers and periodicals.

<sup>3</sup> See paragraph 1.1 of the discussion document.

<sup>4</sup> See for example the findings of the International Postal Corporation's findings that the weight of online shipments to online shoppers fits within the 1 kg limit on page 21 of the discussion document, fn 25.



"delineation of a new market structure, competition and licensing framework"<sup>5</sup> has also unfortunately not provided any clarity on this issue, but has in fact exacerbated the uncertainty as it has approached the market with the assumption that there is currently a proliferation of encroachment into the "reserved postal market" and proposed interventions from the perspective that several operators in the market, including our members, have unlawfully encroached into SAPO's statutory monopoly.<sup>6</sup> The White Paper's interventions such as its proposal that "*Mails and parcels weighing up to 1 kg will thus remain reserved for SAPO... No other entity is allowed to provide services in the reserved market*"<sup>7</sup> are premised on an interpretation of the PSA's provisions that is in our view incorrect and unrealistic. It is also an interpretation that would deprive consumers of choice when it comes to the transport of items under 1 kg, and undermines some fundamental objectives of the Act to "*promote the development of postal services that are responsive to the needs of users and consumers*" and to "*protect the interests of postal users and consumers*"<sup>8</sup>.

18. As the Authority will appreciate, the reality in South Africa is that our members and many other entities have for many years pre-dating the promulgation of the PSA, conveyed millions of letters, postcards and other sub 1 kilogram items. Our members have accordingly cultivated business models and goodwill over these years without intervention or reproach either from the Authority or for that matter, any other law enforcement agencies or courts. An interpretation of the PSA to the effect that the conveyance of sub 1 kilogram items is exclusively reserved for the reserved postal services operator is therefore out of touch with market realities. To interpret the Schedules in the manner done by the White Paper and in certain sections of the discussion document would have the preposterous result that unreserved postal service operators are only permitted to convey letters and postcards that comprise of at least 200 regular A4 sheets of paper on the one hand, while the delivery of a box of pizza (a parcel) would fall within the exclusive operations of the reserved postal service operator on the other.
19. When one has regard to the full context of the text in Schedules 1 and 2 of the PSA, a more reasonable and purposive interpretation of what constitutes the ambit of the reserved postal service is indeed the conveyance of sub 1 kilogram items in a manner that complies with at least one if not both of the subparagraphs (b) and (c) of paragraph 1 of Schedule 1. In other words, the ambit of the reserved postal service would only extend to the conveyance of sub 1 kilogram "*letters, postcards, printed matter, small parcels and other postal articles*" bearing an issued postage stamp, collected from a

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<sup>5</sup> See page 133 of the White Paper.

<sup>6</sup> See paragraph 11.4 of the White Paper.

<sup>7</sup> See paragraph 11.4.1

<sup>8</sup> See sections 2(e) and 2(l) of the PSA.



roadside collection box and addressed to an address box provided exclusively by the reserved postal service operator.

20. This interpretation of the ambit of the reserved postal service would permit the conveyance of the same "*letters, postcards, printed matter, small parcels and other postal articles*" by an unreserved postal service provider. However in this case, it would not bear an issued postage stamp and would not be delivered to the unreserved postal service operator through a roadside collection box and could not be addressed for delivery to an "address box" as these are reserved for the exclusive operations of the reserved postal service operator. Accordingly, it would be left for consumers to decide the manner in which they wish to convey their sub 1 kilogram items. You will immediately recognize that this latter interpretation is more reflective of market realities and we submit, is reflective of the Legislature's intention.
21. While the PSA's provision in Schedule 2 that the unreserved postal service includes the provision of "courier services" in respect of postal items which fall outside the ambit of the reserved service is confusing, it is another helpful indication of the Legislature's intention or rather what it envisaged to constitute the unreserved postal service. When one reads Schedule 2 together with section 22 of the PSA, it is clear that the Legislature envisaged that the unreserved postal services would comprise of the delivery of "*letters, postcards, printed matter, small parcels and other postal articles*" by licensees who would undertake to deliver them in a specific manner.<sup>9</sup> It is not clear from the PSA what exactly comprises "courier services" but there is wide consensus that the unreserved postal service as envisaged by the PSA comprises a much wider array of services, of which courier services is but a sub-segment.
22. Over and above being reflective of reality and a more realistic interpretation of the PSA, our interpretation of the PSA is also consistent with several international conventions of which South Africa is a signatory as the discussion document correctly points out.<sup>10</sup> For example:
- (a) The UNCPC defines postal services for parcels as "*services consisting of pick-up, transport and delivery services and packages, whether for domestic or foreign destinations, as rendered by the national postal administration*" and applies a similar definition for letters delivered by

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<sup>9</sup> Section 22(d) of the PSA provides that a person may only be registered as a courier (i.e an unreserved postal service operator) if he undertakes inter alia to: (i) receive, collect and deliver "*letters, postcards, printed matter, small parcels and other postal articles*"; (ii) to provide track and trace functionalities; (iii) to deliver items within a definite time in relation to cross border deliveries; and to deliver by at least 13h00 on the day following collection of a parcel for domestic deliveries.

<sup>10</sup> Including the Universal Postal Union Convention ("UPU"), the World Trade Organisation General Agreement on Trade in Services ("WTO GATS"), the Services Sector Classification List and the United Nations Central Product Classification ("UNCPC").



national postal agencies.<sup>11</sup> This accords with our interpretation of the reserved postal service envisaged by the PSA, namely that the main difference between reserved postal service and unreserved postal service, with respect to items under the 1 kg limit, is who the consumer entrusts to carry it – the item is “post” when rendered to the postal operator for carriage.

- (b) On the other hand, the UNCPC defines "courier services" as "*services consisting of pick up, transport and delivery services, whether for domestic or foreign destinations of letters, parcels and packages rendered by a courier and using one or more modes of transport, other than by the national parcel administration*"<sup>12</sup> which as you will immediately note, accords with our interpretation of the unreserved postal service.
- (c) The WTO GATS also makes similar distinctions between the postal and courier services. In the Services Sectoral Classification List,<sup>13</sup> sub-sector 2A on postal services cross references the UNCPC prov. subclass 7511 and contains for sub-classes of postal services (all provided by national postal administrations) as follows:
- (i) postal services related to letters consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed materials, whether for domestic or foreign destinations;
  - (ii) postal services related to parcels consisting of pick-up, transport and delivery services of parcels and packages, whether for domestic or foreign destinations;
  - (iii) post office counter services rendered at post office counters such as sales of postage stamps, handling of certified or registered letters and packets and other such post office counter services; and
  - (iv) other postal services which include mailbox rental services, "poste restante" services and public postal services not elsewhere classified (except postal giro and savings accounts, which are classified in the UNCPC under "services of monetary intermediaries").
- (d) Services Sectoral Classification list, sub-sector 2B on courier services cross references UNCPC item 75112 which contains two sub-items as follows:

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<sup>11</sup> See CPC prov. subclass 75111 and 75112 respectively.

<sup>12</sup> See CPC prov. subclass 75121.

<sup>13</sup> MTN.GNS/W/120





- (i) multi-modal courier services consisting of pick-up, transport, and delivery services, whether for domestic or foreign destinations of letters, parcels and packages rendered by courier and using one or more modes of transport; and
  - (ii) other courier services for goods not elsewhere classified such as trucking or transfer services without storage for freight.
- (e) The above international standards are also reflective of the practical differences between reserved and unreserved postal services such as courier services, which provide additional value-adds such as fast delivery, delivery with agreed time frames, track and trace, proof of delivery and negotiable rates. Postal services on the other hand, are standard and routine. These distinctions were also recognized in the unreported SCA judgment in *Interlink Postal Courier SA (Pty) Ltd v The South African Post Office Ltd*<sup>14</sup> where the SCA held that the delivery of an article to a named person constitutes a courier service, whereas delivery to a "post box" is a postal service. Other internationally differentiating factors include the following:
- (iii) The courier industry is not within the scope and does not fall under the auspices of the UPU.
  - (iv) The operations of couriers and other unreserved postal service providers are not related to those of the national postal operators. Unreserved postal service providers rely on their own national and global networks and infrastructure which may include transport vehicles such as trucks, ships and airplanes. Through this network and infrastructure, unreserved postal service operators (or couriers) provide hand-to-hand delivery of all items and packages of any size, including items such as animals, hazardous materials, medical supplies and other such items which national postal operators will not convey.
  - (v) The national postal operators operate in accordance with a mandate and procedures usually from the government. Couriers on the other hand are often multinational businesses that operate in accordance with self determined internal procedures subject to the laws of the countries in which they operate.

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<sup>14</sup> Case Number 473/2001, delivered 27 March 2003. A copy of the judgment is annexed marked "A".



23. Moreover, in the GATS, South Africa made a commitment for courier services in modes 1 (cross-border supply), 2 (consumption abroad) and 3 (commercial presence) with no limitations on market access or national treatment scheduled.<sup>15</sup> In undertaking courier services market access commitments, South Africa cannot maintain or adopt measures, unless otherwise included in their schedule, including “limitations on the number of service suppliers whether in the form of numerical quotas, **monopolies**, exclusive service suppliers or the requirements of an economic needs test (emphasis added).”<sup>16</sup> An interpretation that no company other than SAPO can convey parcels under one kilogram would seem to run afoul of South Africa’s GATS commitments by asserting a monopoly for SAPO, potentially subjecting South Africa to challenge under the WTO’s dispute settlement process. As one of the founding members of the WTO, South Africa is well aware of the implications of its GATS commitments, and made them in the courier sector to attract investment and create an open market for the industry. Given that, a more reasoned interpretation of the PSA reserved area is the one advanced by SAEPA.
24. We note in addition that the meaning of "*address boxes*" as referred to in Schedule 1 of the PSA is itself not defined by the Act and has also been the subject of much contention. It is not clear whether the PSA has a monopoly over the provision of roadside address boxes, post office address boxes, or if the PSA grants SAPO a monopoly over any "box" to which parcels may be delivered for collection. For example, it is not clear whether collection lockers into which couriers may deposit parcels for customer collection (at the instruction of the customer) would fall foul of the provisions of the PSA or not. Our submission is that the PSA only grants the PSA a monopoly over the provision of address boxes to which post may be delivered (such as roadside address boxes and post office address boxes). Further clarity is therefore required in this respect. For completeness, we note that the wording of the PSA clearly does not grant any exclusive right over the personal delivery of postal items to an actual addressee or his agent to SAPO.
25. With the above in mind, it is easy to see that the biggest regulatory hurdle and risk for unreserved postal service providers is the uncertainty that has plagued the PSA since its enactment. We respectfully submit therefore that in order to fully understand and therefore resolve any other regulatory issues, it is essential for the Authority, the Minister and indeed Legislature to take measures to clarify the scope of the reserved and unreserved postal services to remove any ambiguity. It should be clear, having regard to the legislation and the international conventions discussed above, which

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<sup>15</sup> See General Agreement on Trade in Services, South Africa Schedule of Specific Commitments, April 15, 1994, GATS/SC/78 (1994).

<sup>16</sup> General Agreement on Trade in Services, article XVI:2(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).



specific services are reserved for the national postal operator and which are open for competition by other unreserved postal service operators. To that end, it should also be made clear as far as possible, which items fall under the wide-ranging "postal article". The Postal Services Amendment Bill, 2018<sup>17</sup> has removed the words “outside the ambit of the reserved postal service” from the definition of “unreserved postal service”, which is indeed a step in the right direction. However it also appears that the “reserved postal service” and “unreserved postal service” will fall to be determined and amended as necessary by the Minister, which will result in further ambiguity. We will address issues arising from the PSA Bill once Parliament makes a call for public comment but submit for present purposes that for the market and for consumers, clear definitions in line with the UNCPC would make the most sense.

26. We will now move to address the Authority's specific questions with the above background in mind.

**SECTION C**

**QUESTION 1: IN YOUR VIEW DO THE REGULATIONS ACHIEVE THE OBJECTIVES AS STIPULATED IN SECTION 2 OF THE PSA?**

Objects of The Act	Yes/No	Elaborate
<p>promote the provision of a wide range of postal services in the interest of the economic growth and development of the Republic.</p>	<p>No</p>	<p>For reasons of ambiguity discussed above and the interpretation of Schedules 1 and 2 of the PSA previously adopted by regulators and the Department, not only do the regulations fail to achieve this objective, but they are in fact actively restricting the provision of a wide range of postal services in South Africa.</p> <p>In addition, given the ever present threat of expropriation of business under the current legislative framework, the regulations are not conducive to new or additional investment into the unreserved postal service. On the Authority's own research, the unreserved postal service is estimated to be worth around R20 billion per annum. Our members account for a substantial amount of this business which they are constantly under threat of losing to the reserved postal service</p>

<sup>17</sup> Tabled by the Minister before the National Assembly on 16 November 2018.



		<p>operator and will continue to do so unless the regulations are clarified.</p> <p>We note further that in terms of section 62 of the Act, the failure to produce a licence or registration certificate is a criminal offence for which a fine or imprisonment for a period of no more than 2 years may be imposed. In addition, section 82 also criminalises the operation of "postal services" without a licence or registration certificate in relation to which a fine or imprisonment not exceeding 5 years may be imposed.</p> <p>Given the ambiguity surrounding the exact scope of "postal services" discussed above, and as already seen by the Authority in practice, the imposition of imprisonment for engaging in acts that are criminalized by a statute that is ambiguous at best is excessive and discourages participation in the sector to the detriment of customers and the economy in general.</p>
<p>make progress towards the universal provision of postal services;</p>		<p>While this is an objective of the PSA generally, we consider that by its nature, it does not, and should not, apply to private unreserved postal service operators.</p> <p>As mentioned above, unreserved postal service operators as an industry is distinct from post, falling outside the auspices of the UPU (from where the universal service obligation originates). Similarly, while national postal operators have access to public funds and therefore can be expected to work towards public interest goals, unreserved postal service operators are required to invest in their own transportation network from their own funds.</p> <p>Accordingly, the universal provision of postal service, while a commendable objective, is properly one that is to be met via public companies and funds rather than by private unreserved</p>



		postal service operators.
encourage investment and innovation in the postal industry;	No.	<p>See our comments in relation to object (a) above. In addition, the Authority's own research has shown that e-Commerce has had a large impact on the sector as a whole as consumers are looking for safer, cheaper and ultimately, faster and convenient ways of shopping which places enormous pressure on retailers to procure delivery services from reliable international and local unreserved postal service operators.<sup>18</sup></p> <p>This in turn also places pressure on unreserved postal service operators to constantly improve their service offering to retailers and end-consumers alike.</p> <p>However, under the current regulations, a finding by a court of law or the Authority that SAPO is the exclusive conveyor of all sub- 1 kilogram items would have the result that online retailers and end-consumers must send and receive all such items by national post which is patently unreasonable and in any event practically impossible. More importantly, given that national postal operators ordinarily have a statutory monopoly over the conveyance of items by post, they do not have any incentive to improve their service offering or innovate as there is no threat of losing market share.</p> <p>Regulations that carry the risk that a national operator has a monopoly over the conveyance of sub 1 kilogram items altogether will have a detrimental impact on innovation in that market as there will be no incentive to improve services. The ultimate result is that new entrants and in particular, SMEs with innovative postal and courier services are deterred from investment, entry and participation as a result of the ever-present threat of expropriation.</p>

<sup>18</sup> Paragraph 3.1.4 of the discussion document, page 20.



<p>promote the development of postal services that are responsive to the needs of users and consumers;</p>	<p>No.</p>	<p>As already discussed above, the manner in which regulators and the executive have sought to interpret Schedules 1 and 2 of the PSA restricts consumers (counterintuitively as we have pointed out) to conveying their personal items which weigh less than 1 kg with the reserved postal operator. This is not only out of touch with reality, but is a patently irrational restriction and distortion of consumer choice. This is at odds with the objectives of the PSA as well as other legislation including the Consumer Protection Act, 2008 and the Competition Act, 1998.</p>
<p>ensure fair competition within the postal industry;</p>	<p>No.</p>	<p>Refer to our discussion above in relation to the interpretation of the PSA.</p>
<p>promote stability in the postal industry;</p>	<p>No.</p>	<p>As already mentioned above, unreserved postal services operators, including our members, have to deal with the constant threat of expropriation of their property due to the ambiguity of the PSA insofar as it relates to the ambit of the reserved and unreserved postal services. Our members have had to answer to several legal attacks on their business brought mostly by SAPO which has sought to have their operations declared unlawful for contravening the provisions of the PSA.</p> <p>As we speak, the Complaints and Compliance Committee of ICASA must decide a complaint laid by SAPO against one of our members, PostNet Southern Africa Proprietary Limited in which SAPO alleges that PostNet <i>inter alia</i> provides "<i>reserved postal services</i>" without a valid licence to do so, including:</p> <ul style="list-style-type: none"> <li>(f) the receipt and dispatch of letters, small packets and other postal articles that weigh less than 1 kg for receipt at the ultimate destination;</li> </ul>



		<p>(g) the provision of mail boxes to consumers; and</p> <p>(h) the issuance of postage stamps.</p> <p>This is but the most recent event in a history of litigation and other engagements that has ensued between SAPO, the Authority and several members of SAEPA. Until interventions are made to clarify the provisions of the PSA and clearly outline which service providers may serve which market, the postal services market will not be stable. Investors require a stable and predictable regulatory environment. Unstable and ambiguous laws reduce capital investments which reduces productivity, output, and employment and erodes the ability of South African companies to compete in global markets.</p>
protect the interests of postal users and consumers;	No.	See our comments in relation to objective (d) above.
promote small, medium and microenterprises within the postal industry.	No.	<p>In 3.1.2 of the discussion document the Authority notes the sharp decline in the number of registered operators between 2006 to date. We submit that this sharp decline may be attributed to the ambiguity in relation to the scope of the reserved and unreserved postal service noted above. Given this ambiguity, it is likely that many unreserved postal service operators are simply not aware that they operate in this space and are therefore not aware of the obligation to apply for a registration certificate in accordance with regulation 4(1) of the regulations.</p> <p>In addition, the registration fees that are imposed upon unreserved postal service operators are a likely barrier to entry into the market for SMEs. In terms of the regulations, an unreserved postal service operator is required to make payment of an annual fee of R5,000 in addition to a R1,000 application fee (for first time registrations and renewals). This</p>



		<p>means that every new entrant, in addition to investing in the infrastructure to operate, must also make payment of what is an administrative fee of R6,000, which could be a burden for many SMEs.</p> <p>It is currently not clear whether the abovementioned licensing fees are intended to cover the Authority's administrative cost in processing registration and renewal applications, or whether they are intended as a means of generating revenue for the Authority or the fiscus in general. We respectfully submit that any fees that are intended for the latter purpose should not be retained as this is likely to deter market entry.</p> <p>The purpose of the current licensing fees must be made clear. We assume that the R1,000 licensing and renewal fees are to cover administration fees and that the annual R5,000 fee is to cover the cost of monitoring and maintaining the sector but this should be made transparent.</p>
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**Question 2: What do you think are the contributing factors to the declining numbers of registered operators?**

27. As already stated in our response to Question 1 above, we anticipate that a large number of unregistered postal service operators are simply not aware that they provide an unregistered postal service and are therefore not aware of their obligations to register their operations and make payment of the application and licensing fees. In addition, payment of an annual fee of R5,000 may also be a deterrent for a number of SMEs.

**Section D**

**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.**

28. We have dedicated much of these comments to dealing with this question in paragraphs **Error! Reference source not found.** to 26 above and will not repeat our submissions here save to reiterate that in its current format, the definition of the reserved and unreserved postal service is inadequate,





ambiguous and goes against all international conventions on postal services, including those listed by the discussion document at paragraph 4.1.1.<sup>19</sup>

29. We have submitted proposed wording for possible legislative amendments to the PSA which we submit would remove the uncertainty that has plagued the sector for many years. By way of example, if it is the intention of the legislature that an "unreserved postal service provider" is simply a reference to "couriers", the PSA can provide that an unreserved postal services consists of:

*"services consisting of pick-up, transport and delivery services for reward, whether for domestic or foreign destinations, any letter, postcard, printed matter, parcels or packages by using one or more modes of transport provided by any entity except for the reserved postal services operator".*

30. Unreserved postal service providers may then be obliged if necessary by the PSA to provide the following minimum services:

- (i) receive, collect and deliver the items to and from an address provided by the customer;
- (j) provide track and trace services of the whereabouts of postal items received or collected for delivery;
- (k) deliver any items within a definite time to be agreed between the unreserved postal service operator and its customers; and
- (l) to clear any items through customs on behalf of customers where applicable and as agreed with customers.

31. The PSA can provide that the reserved postal services, on the other hand, comprise of:

*"services consisting of pick-up, transport and delivery services for reward, whether for domestic or foreign destinations, any letter, postcard, printed matter, parcels or packages by post provided by the reserved postal services operator, including post office counter services which include:*

- (a) the issuance and sale of postage stamps;*
- (b) the handling of certified or registered letters and parcels;*
- (c) the provision of post office boxes and roadside collection mailboxes; and*

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<sup>19</sup> Page 24 of the discussion document.



(d) *post and mailbox rental services."*

32. The above proposed definitions would provide clarity as far as possible and be more reflective of the market in practice and in line with international standards.

**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.**

33. There is very little need, if any, for the Authority or indeed the legislation to impose regulatory or statutory service standards on unreserved postal service operators. The terms and conditions of service between operators and customers is a matter for agreement between the parties and their right to contract should as far as possible remain unfettered in order to enable flexibility of terms. In addition, prescribing minimum standards may inadvertently increase operator costs (through for example having to purchase costly track and trace software in order to meet standards) and therefore increase price, drive participants out of the market and inhibit new entry.
34. In any event, the industry is extremely competitive and operators are forced to offer a competitive and efficient service by the threat of losing market share to their competitors. Accordingly, service standards such as delivery time frames, collection and delivery terms etc are dictated by market forces and the regular rules of competition and regulatory intervention in this respect is unnecessary and may be too restrictive. The market and consumers are in any event already adequately protected by generally applicable legislation such as the Competition Act, 1998 and the Consumer Protection Act, 2008. We note for completeness in any event that the majority, if not all of our members already provide the minimum standards imposed by Section 22(d) of the PSA.

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

35. Under the current regulations, all providers of postal services are required to either be licenced or registered with the Authority. The sole reserved postal services provider which is responsible to deliver South Africa's universal service obligations and receives subsidies and grants from the government, requires a licence to operate. Unreserved postal service operators on the other hand, which participate in the competitive market only require a registration certificate issued by the Authority which can be renewed every 3 years. A necessary consequence for the reserved postal service operator is that its licence must contain the condition that it will fulfil the universal postal



service, which condition is not necessary, or appropriate, for any other postal service provider. Accordingly, the difference in licencing procedures for reserved and unreserved postal service providers is appropriate in our opinion.

36. As already stated in our response to Question 1 above, the current licencing fees may be burdensome for some SMEs. This being said, if it is made clear and transparent that the application fees and annual fees are commensurate to the Authority's administrative costs and the cost of monitoring the industry, we do not have any objections to the current framework.

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

37. We do not have any objections to the current 3 year licence validity period. However, given the substantial renewal costs involved, it may be beneficial for the industry, and in particular SMEs, if the licence validity period was extended to 5 years with a commensurate increase if any of the renewal fees.

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

38. South Africa's WTO GATS obligations include the obligation to ensure that there are no limits on market access in the courier services market. The imposition and prescription of unreasonable licence conditions or fees on unreserved service operators may amount to a limit to market access in breach of South Africa's GATS commitment. Accordingly, we would caution against the imposition of any licencing conditions on licences issued to unreserved postal service operators.
39. In addition, as already stated above, we do not have any objection to the current fee structure and would in fact also caution against the prescription of fees on a sliding scale as this would be discriminatory and may in fact be contrary to South Africa's GATS obligations. We do not see the necessity for the Authority to have separate application and approval processes or classifications for unreserved postal service providers based on the scale of their operations. The current single unreserved postal service provider for all operators is sufficient in our view.
40. We also do not see any reason why the Authority would need to extract different fees from operators based on the scale of their operations in order to cover its administrative and monitoring costs which we would expect to be the same for each operator irrespective of size. We note in this respect that Article VI:5 of GATS imposes a rule that any new restrictions must comply with certain basic norms



unless those restrictions were reasonably anticipated at the time of the commitment. Article VI:5(a) provides that service sectors for which commitments have been made by a country: shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: inter alia, is not more burdensome than necessary to ensure the quality of the service and in the case of licensing procedures, do not in themselves constitute a restriction on the supply of the service.

41. We note that section 30A of the PSA currently places a discretion in the hands of SAPO to provide for the insurance of postal articles but by no means obliges it to do so. We have not had sight of SAPO's licencing conditions but do not believe that any such obligation has been imposed upon it by the Authority therein. Any requirement or licence condition that unreserved postal service operators must provide or arrange for the insurance of postal would therefore similarly be discriminatory and in breach of South Africa's WTO GATS obligations. In any event, any such licence obligation would immediately either require all unreserved service providers to also become financial service providers or intermediaries in accordance with South African financial service sector laws such as the Financial Advisory and Intermediary Services Act,<sup>20</sup> increase costs and ultimately price to the detriment of consumers. The PSA Amendment Bill also indicates an intention by the Department to require both SAPO and unreserved postal service operators to provide mandatory insurance for postal articles. Our comments in relation to Section 30A of the PSA will remain valid even under the amended PSA. While unreserved postal service operators can provide products offering additional protection to consumers, this should not be a mandatory requirement to provide "insurance" but rather a product that falls within the ambit of courier services, for example offering enhanced or additional liability against additional fees on terms agreed between the operator and customer.
42. We have also engaged the Department in relation to the White Paper's suggestion that participants in the unreserved postal service segment must contribute to a universal service fund which we understand is intended to assist the reserved postal service operator to fulfil its universal postal service mandate. In this regard, we note the following:
- (m) The unreserved postal service as we define it clearly does not fall within the UPU. The UPU and any obligations imposed from it extend to designated operators which are often public entities that have the benefit of state support and access to other public facilities which are not open to entities which operate within the private, competitive unreserved postal service space.

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<sup>20</sup> 37 of 2002



- (n) in order to achieve the crucial objective of a universal postal service, designated operators deliver foreign packages through international postal agreements facilitated and mandated by UPU documents and instruments including all exemptions and privileges set out in the UPU.
  - (o) Unregistered postal service operators in contrast do not benefit from any such exemptions and privileges set out in the UPU, but operate like any other private company that is driven by profits and contribute to the national fiscus through applicable tax and regulatory fees. Their means of operation are not related to the businesses of national postal companies (reserved services operators). Couriers rely on national and global networks and infrastructure of their own which include transport vehicles such as, trucks and airplanes.
  - (p) In practice, the South African postal service industry is no exception to the industry described above. SAPO is the national postal service operator that is bound by local legislation and the UPU to deliver a universal postal service, with the concomitant access to public facilities, funds and UPU exemptions and privileges. In addition, the PSA has also carved out a monopoly for SAPO in various respects (such as the issuance of postage stamps and the provision of roadside collection and address boxes) in order to protect revenue to fund SAPO's crucial universal postal service mandate. Unreserved postal service providers on the other hand, one of which it must be noted is SAPO itself, operate on entirely privately funded and established models and infrastructure and indeed pay to SARS what is due to it like all other citizens. In addition, they are subject to the daily rigours of competition from other market participants including SAPO, while they themselves are excluded from participation in the reserved postal service.
43. Given the fact that unreserved postal service operators are not themselves allowed to participate in the reserved postal service space and do not enjoy the public benefits accruing to SAPO, it is not apparent to us why they should have conditions imposed on them to contribute to the fulfilment of the universal postal service while the general public will not be called upon to contribute to this objective. The universal postal service is a benefit to the general public, it should be funded through generally applicable taxes. In our view however, if there were a rational basis in law to oblige unreserved postal service providers to contribute to a universal postal service fund, this obligation should not only be restricted to courier companies and must extend to all service providers engaged throughout the entire postal services supply chain and involved in the conveyance of postal articles. This includes for example, freight forwarders, airlines, bus companies and other logistics firms. Unreserved postal service providers in any event already contribute to the universal service obligation through public



taxation from which government raises funds to subsidise the operations of SAPO. For unreserved postal service providers to be levied again, for the achievement of a public objective, amounts to double taxation, which is against the principles of fair and equitable regulation.

44. In addition, universal service funds tend in our view to create impediments to the development of the sector, similar to monopoly schemes. Monopolies lack competitive pressure to improve performance. High taxes (which represent the nature of the universal fund contribution) also tend to deter efficient market entrants, in particular smaller market players. Indeed, taxes and fees on certain services that are higher than taxes and fees on other goods and services impose a heavy burden on consumers and distort consumer choices and investment decisions, resulting in large and unnecessary social costs. In addition, high fees reduce capital investments which reduces productivity, output, and employment and erodes the ability of South African companies to compete in global markets.
45. In any event, it does not appear that any study has been conducted in order to estimate the total cost of investment required in order to achieve a universal postal service in South Africa, and therefore determine the requisite levels of this universal postal service fund. It is therefore not clear that SAPO in fact requires additional funds than the budgetary grants it receives from government as well as the revenue generated from its statutory monopolies in order to achieve a universal postal service.

**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?**

46. See our comments in paragraphs **Error! Reference source not found.** and **Error! Reference source not found.** above.

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

47. See our comments in paragraphs **Error! Reference source not found.** and **Error! Reference source not found.** above.

**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.**

48. We consider that the key objectives of monitoring and enforcement should be an effective but also equitable regulatory environment. Clarity and transparency are also other crucial metrics that should be borne in mind.



49. As we have elaborated above, there are areas where the regulatory environment is in need of improvement. Bearing in mind the GATS obligation that South Africa is subject to, the move should be towards liberalisation rather than the imposition of onerous or further obligations.

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

50. While the availability of an avenue to report is certainly commendable, creating an obligation to report unregistered operators would appear to amount to the imposition of an onerous liability, not in keeping with a market-focused approach.

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

51. As indicated above, certainly the provision regarding imprisonment is one that should be looked into and re-considered. The penalty fee of up to R250,000 is appropriate insofar as the exact amount of penalty will be determined on a case by case basis taking into account the relevant factors such as the materiality of breach and effects of that breach on the market.

## **SECTION E**

**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.**

52. We consider that local ownership requirements should be a matter that is dealt with across the board, rather than on an industry-by-industry basis. Unreserved postal service operators are also required to comply with other local laws which already impose local ownership requirements such as the Broad Based Economic Empowerment Codes of Good Practice<sup>21</sup>. It would therefore appear inappropriate for specific industries to impose yet further requirements.

53. At the end of the day, in an extremely competitive courier market, good service is the key element. Companies with international ties that are able to provide the services that consumers require should not be penalised, in contrast to companies that may be completely local in nature but unable to provide the same services to consumers and, ultimately, to the economy. In addition, industry specific

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<sup>21</sup> Published in accordance with the Broad-Based Black Empowerment Act, 2003.



local content requirements may inadvertently disincentivise much needed foreign direct investment and therefore restrict economic growth and ultimately job creation.