

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 438

22 MARCH 2019

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT
NO. 13 OF 2000****POSITION PAPER ON UNRESERVED POSTAL SERVICES**

1. The Independent Communications Authority of South Africa ("the Authority") gave notice of its intention to conduct an inquiry into the effectiveness of the Regulations on Unreserved Postal Services, 2010 ("Regulations") in terms of section 4B of the Independent Communications Authority of South Africa Act no. 13 of 2000 ("ICASA Act"), as indicated in a Discussion Document on Unreserved Postal Services ("Discussion Document") published in Government Gazette No. 41928 of 28 September 2018.
2. The Authority has since received responses to the said Discussion Document. No public hearings were held.
3. The Authority hereby publishes the attached notice regarding the conclusion of the inquiry into the the effectiveness of the Regulations in terms of section 4B of the ICASA Act.

A handwritten signature in black ink, appearing to read 'R. Mohlaloga', written over a light grey rectangular background.

RUBBEN MOHLALOGA**CHAIRPERSON**



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

POSITION PAPER ON UNRESERVED POSTAL SERVICES

1. On 28 September 2018, the Independent Communications Authority of South Africa ("the Authority") published a notice of its intention to conduct an inquiry into the Regulations on Unreserved Postal Services, 2010 ("Regulations") in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("the ICASA Act"), as indicated in a Discussion Document on Unreserved Postal Services ("Discussion Document")¹
2. The purpose of the Inquiry was to evaluate the effectiveness of the Regulations on Unreserved Postal Services, 2010, ("Regulations")² primarily focusing on regulatory challenges that affect the unreserved postal sector.
3. The closing date for written submissions on the Discussion Document was 03 December 2018. The Authority received three (03) submissions from interested parties in response to the Discussion Document. The written submissions were received from the South African Post Office ("SAPO"), South African Express Parcel Association ("SAEPA"), DHL International (Pty) Ltd ("DHL Express").
4. The Authority has concluded the inquiry into the effectiveness of the Regulations. In summary, the Authority's findings are that -

¹ Government Gazette No. 41928 Notice No. 1000 of 2018.

² Government Gazette No. 32859. Notice No. 13 of 8 January 2010.

the Regulations are inefficient to address challenges of the unreserved postal services due to the following reasons:

- The registration process is inadequate for regulation of the sector;
- Fees payable are not applicable to the current environment; and
- The duration of the registration certificate is inadequate.

Therefore, the Authority will review the Regulations. The review will be informed by the Postal Services Act no. 124 of 1998 as amended ("PSA") in its current form.

5. A copy of the Authority's Position Paper into the effectiveness of the Regulations is available on the Authority's website (www.icasa.org.za) and at the Authority's head office library (Block C, 350 Witch-Hazel Avenue, Eco Point Office Park Eco Park, Centurion) during office hours (Mon-Fri from 09h00 to 16h30).



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POSITION PAPER ON UNRESERVED POSTAL SERVICES

MARCH 2019

TABLE OF CONTENTS

1	INTRODUCTION	6
2	BACKGROUND	7
3	LEGISLATIVE FRAMEWORK.....	8
	THE NATIONAL INTEGRATED ICT POLICY WHITE PAPER AND POSTAL SERVICES BILL	9
4	ANALYSIS OF SUBMISSIONS	10
	OBJECTS OF THE PSA	10
	DEFINITIONS.....	19
	LICENSING AND REGISTRATION	23
	REGISTRATIONS FEES	27
	COMPLIANCE MONITORING AND ENFORCEMENT	30
	UNIVERSAL SERVICE OBLIGATIONS AND FUNDING	33
	CONTRAVENTIONS AND PENALTIES.....	35
5	CONCLUSION	36

1 INTRODUCTION

- 1.1. On 28 September 2018, the Independent Communications Authority of South Africa ("the Authority") published a Discussion Document³ ("Discussion Document") in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("the ICASA Act").
- 1.2. The purpose of the Inquiry was to evaluate the effectiveness of the current Regulations on Unreserved Postal Services, 2010⁴, ("Regulations") primarily focusing on regulatory challenges that affect the unreserved postal sector.
- 1.3. The closing date to submit written submissions on the Discussion Document was 03 December 2018. The Authority received three (03) submissions from stakeholders in response to the Discussion Document. The written submissions are from the South African Post Office ("SAPO"), South African Express Parcel Association ("SAEPA") and DHL International (Pty) Ltd ("DHL Express").
- 1.4. The Authority has since reviewed the submissions in conjunction and included in the Discussion Document and has accordingly compiled a Position Paper on this process.
- 1.5. This Position Paper sets out a summary of the written submissions by industry stakeholders to the questions posed by the Authority in the Discussion Document, and the Authority's findings and positions in the following manner:
 - The objects of the PSA;
 - Definitions;
 - Licensing and Registration;
 - Fees and Registration;

³ Government Gazette No. 41928 Notice No. 1000 of 2018

⁴ Government Gazette No. 32859. Notice No. 13 of 8 January 2010.

- Compliance, Monitoring and Enforcement;
- Universal Service Obligation and Funding; and
- Contraventions and Penalties.

2 BACKGROUND

- 2.1. The postal market in South Africa is delineated into two main categories, being the reserved and unreserved postal services. SAPO has a legal mandate to provide all mail items and parcels under one (01) kilogram as per Schedule 1 of the PSA.
- 2.2. Unreserved postal services relate to services that have not been reserved for SAPO, and comprise of all letters, postcards, printed matter, small parcels and other postal articles larger than and/or heavier than the reserved dimensions up to and including thirty (30) kilograms as per Schedule 2 of the PSA.
- 2.3. The Authority initiated an Inquiry into unreserved postal services through the publication of a Discussion Document in terms of section 4B of the ICASA Act. The Discussion Document took into consideration the regulatory framework for unreserved postal services provided for by the National Integrated ICT Policy White Paper, 2016 ("White Paper")⁵ and the legislative review process on the PSA with respect to unreserved postal services undertaken by the Department of Telecommunication and Postal Services ("DTPS").

⁵ Government Gazette No. 40325 Notice No. 1212 of 3 October 2016.

3 LEGISLATIVE FRAMEWORK

- 3.1. In terms of section 2 read with section 3 (1A) of the ICASA Act, the Authority is established to regulate electronic communications, broadcasting and postal services.
- 3.2. In terms of section 4B of the ICASA Act, the Authority is empowered to conduct an inquiry into any matter to achieve the objects of the ICASA Act and underlying statutes, to regulate and provide guidelines, to ensure compliance with the said legislation and licence terms and conditions, in exercising and performing its powers, functions and duties.
- 3.3. With regards to the regulation of unreserved postal services, some of the primary objects of the PSA are to promote the regulation and control of the postal services sector in the public interest and for that purpose the Authority is to:

“(d) encourage investment and innovation in the postal industry;

(e) promote the development of postal services that are responsive to the needs of users and consumers;

(g) develop greater equity in respect of the distribution of services, particularly within the areas of historically disadvantaged communities, including rural areas;

(j) ensure fair competition within the postal industry;

(k) promote stability in the postal industry;

(l) protect the interests of postal users and consumers;

(m) promote the effective maintenance of an efficient system of collecting, sorting and delivering mail nationwide, in a manner responsive to the needs of all categories of mail users; and

(q) promote small, medium and macro-enterprises within the postal industry."

- 3.4. Section 20 of the PSA prohibits any operator from operating unreserved postal services unless registered with the Authority and issued with a registration certificate, while section 21 of PSA empowers the Authority to prescribe procedure and fees applicable for registration.

THE NATIONAL INTEGRATED ICT POLICY WHITE PAPER AND POSTAL SERVICES BILL

The White Paper provides for change in law as follows:

- That the Authority must prescribe Regulations that will shift the licensing framework from registering to licensing unreserved postal services;
- The Regulations must be accompanied by the standard terms and conditions for the license categories.

Although the Postal Services Amendment Bill (2017) No. 41246⁶ ("The Bill") is yet to be finalised, the Authority probed issues raised by the White Paper, the impact of which will affect the existing regulatory framework, particularly with respect to unreserved postal services.

⁶ Government Gazette No. 41246 Notice No. 1255 of 10 November 2017.

4 ANALYSIS OF SUBMISSIONS

OBJECTS OF THE PSA

- 4.1. The section dealing with the objects of the PSA in the Discussion Document, was not placed under issues for public discussion. However, a few questions were posed for comments on several objects of the PSA, which support unreserved postal services.

Question 1: In your view, do the Regulations achieve the objectives as stipulated in section 2 of the PSA?

4.1.1. *Objective 1: Promote the provision of a wide range of postal services in the interest of the economic growth and development of the Republic:*

- 4.1.1.1. SAPO is of the view that there has been growth in the sector with numerous entrants into the market of both large and small-scale players. The key weakness is the apparent lack of mechanisms to measure the contribution of the sector to the Gross Domestic Product and whether market dominance is a factor.
- 4.1.1.2. SAEPA submits that, given the ever-present threat of expropriation of business under the current legislative framework, the Regulations are not conducive to new or additional investment in unreserved postal services. SAEPA members account for a substantial amount of the unreserved postal services business but argue that they are constantly under threat of losing business to the reserved postal service operator and will continue to do so unless the Regulations are clarified.
- 4.1.1.3. SAEPA further states that in terms of section 62 of the PSA, 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 two (2) years may be imposed. Thus, SAEPA submits that 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 criminalised by a statute that is ambiguous at best is excessive and discourages participation in the sector to the detriment of customers and the economy.

4.1.1.4. DHL Express submits that the wider regulatory context, both in the current regulatory regime and the one proposed in the current version of the Bill poses unnecessary obstacles i.e. restricting the provision of a wide range of postal services in South Africa to the courier industry, and in the achievement of this object in the Act.

4.1.2. ***Objective 2: Make progress towards the universal provision of postal services:***

4.1.2.1. SAPO submits that progress towards the universal provision of postal services has been less successful. While players in the unreserved market have grown the sector, they have largely concentrated in urban and accessible markets, leaving SAPO to service previously disadvantaged, remote and largely rural communities. Perhaps the introduction of a universal service fund will offset this bias.

4.1.2.2. SAEPA submits that this objective is considered by its nature to not and should not, apply to private unreserved postal services operators since unreserved postal services fall outside the auspices of the Universal Postal Union ("UPU") where the universal service obligation originates. Moreover, unreserved postal services operators are required to invest in their own transportation network from their own funds.

4.1.2.3. DHL Express is of the view that private enterprises and courier companies already pay taxes towards the achievement of public aims. Usually, where government requires a private company to carry out investment and works for public benefit, it is done as a Public-Private-Partnership where the company gets compensated.

4.1.3. ***Objective 3: Encourage investment and innovation in the postal industry:***

4.1.3.1. SAPO submits that investment in the sector has been largely in the form of infrastructure, transportation and technology. Innovation has largely been driven by technological processes i.e. track and trace.

4.1.3.2. SAEPA posits that 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, Small, Medium and Micro Enterprises ("SMME's") with innovative postal and courier services are deterred from investment, entry and participation because of the ever-present threat of business expropriation.

4.1.3.3. DHL Express argues that defining reserved services should ideally be set out and specified. For example, the provision of "SWIP boxes" as 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.

4.1.4. Objective 4: Promote the development of postal services that are responsive to the needs of users and consumers

4.1.4.1. SAPO is of the view that, to some degree, the sector has responded to consumer needs and preferences, but in many cases this has been inhibited by the lack of total commitment to servicing the last mile. While Regulations allow for it, commercial imperatives have restricted its full impact.

4.1.4.2. SAEPA submits that the way regulators and the executive of government have sought to interpret Schedules 1 and 2 of the PSA restricts consumers 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, according to SAEPA, is at odds with the objectives of the PSA as well as other legislation including the Consumer Protection Act, 2008⁷ ("CPA") and the Competition Act, 1998⁸ ("Competition Act").

4.1.5. Objective 5: Ensure fair competition within the postal industry.

4.1.5.1. SAPO submits that there is relatively fair competition in the industry. However, the fact that many players can participate in the industry without registration suggests that there is still scope for improvement in this aspect.

4.1.5.2. DHL Express submits that, 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. If the courier market is going to be treated as part of the postal industry, and regulated as such,

⁷ Act No. 68 of 2008.

⁸ Act No. 89 of 1998, as amended.

then such regulation should be promulgated in line with the legislative objectives recorded in the Act.

4.1.6. Objective 6: Promote stability in the postal industry:

4.1.6.1. SAPO submits that the perennial tension between the unreserved and reserved markets in the postal sector does not lead to stability. Litigation between players across the markets suggests that in fact there is instability. Regulations need to be clearer with respect to these markets and consideration needs to be given to the possibility of a single market.

4.1.6.2. SAEPA submits that there is no stability in the postal industry by citing the current litigation between SAPO and PostNet (Pty) Ltd.

4.1.6.3. DHL Express submits that the non-definition of the reserved and unreserved postal services left to be determined by the Minister in the recent postal services Bill would appear to introduce an element of uncertainty into the legislative process. DHL Express is of the view that the representations on the current regime remain valid.

4.1.7. Objective 7: Protect the interests of postal users and consumers:

4.1.7.1. SAPO is of the view that current the Regulations tend to favour service providers in the sector. The consumer's ability to find redress is severely curtailed by the processes and timeframes that must be adhered to, in order to find a procedurally correct complaint.

4.1.7.2. SAEPA submits that the Regulations do not achieve this objective, as in their view, the interpretation of Schedules 1 and 2 of the PSA restricts consumers 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 according to SAEPA. Further, SAEPA states that this is at odds with the objectives of the PSA as well as other legislation including the CPA and the Competition Act.

4.1.7.3. DHL Express submits that the Regulations do not achieve this objective in line with their submissions to this question.

4.1.8. ***Objective 8: Promote small, medium and micro enterprises within the postal industry:***

4.1.8.1. SAPO submits that while the Regulations do not hinder the entrance into the sector by such players, there are no specific measures in place to offer tangible assistance to these players. Thus, the ability of these players to scale up their operations is severely limited.

4.1.8.2. SAEPA submits that this sharp decline noted by the Authority in the Discussion Document may be attributed to the ambiguity in relation to the scope of the reserved and unreserved postal services. 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.

4.1.8.3. SAEPA further argues that the registration fees that are imposed upon unreserved postal service operators are a likely barrier to entry into the market for SMMEs. SAEPA also states that it is currently not clear whether the abovementioned licensing fees are intended to cover the Authority's administrative costs in processing registration and renewal applications, or whether they are intended as a means of generating revenue for the Authority or the fiscus.

4.1.9. The Authority's Findings

- 4.1.9.1. The Authority found that the view of stakeholders is that there is growth in the sector, with various players large and small, entering the market. However, there is a threat of losing business due to the ambiguity in the definition or scope of postal services. This threat is seen as excessive by SAEPA and may compromise growth by way of investment and innovation in the sector.
- 4.1.9.2. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions. Further, operating without a licence being criminalised is seen as excessive and a deterrent to new entry into the sector to the detriment of consumers.
- 4.1.9.3. The Authority found that the Regulations do not promote progress towards the universal provision of postal services. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions. They argue that players in the unreserved market have grown the sector but are largely concentrated in urban and accessible markets.
- 4.1.9.4. Another view is that this objective should not apply to private unreserved postal services operators since unreserved postal services fall outside the auspices of the Universal Postal Union ("UPU").
- 4.1.9.5. The Authority found different views on whether or not the Regulations achieve the objective of encouraging investment and innovation in the postal industry. One view is that there is investment in infrastructure, transportation and technology.
- 4.1.9.6. However, the other view is that there can never be achievement of this objective because of the national operator's monopoly over the conveyance of sub 1-kilogram items. The result of the monopoly is

that new entrants and, Small, Medium and Micro Enterprises (“SMME’s”) with innovative postal and courier services are deterred from investment, entry and participation because of the ever-present threat of business expropriation. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions.

- 4.1.9.7. With respect to the development of postal services responsiveness to the needs of consumers, the Authority found different views. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions. On the one hand it is argued that to some degree the sector responded to consumer needs however, this was inhibited by commitment to servicing the last mile.
- 4.1.9.8. On the other hand, the Regulations adopted an interpretation of Schedule 1 and 2 of the PSA which results in limited consumer choice in conveying parcels. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions.
- 4.1.9.9. The Authority found that stakeholders are of the view that the Regulations relatively promote competition in the sector. This is primarily because registered operators compete with unregistered operators, leading to unfair competition. Although this is the view of stakeholders, no evidence was provided to substantiate these submissions.
- 4.1.9.10. The Authority found that stakeholders are of the view that the Regulations do not promote stability in the postal industry. Where there is no assurance on which services can be provided by unreserved operators then there cannot be investment.
- 4.1.9.11. With respect to the protection of consumer interests, the Authority found that stakeholders are of the view that the Regulations adopted interpretation of the PSA Schedules that hinders consumer choice of

personal items conveyance. Moreover, the Regulations tend to favour the Operators and not provide better mechanisms for redress of consumer complaints.

4.1.9.12. Lastly, the Authority found that some stakeholders are of the view that the Regulations do not hinder entrance into the sector. However, they do not provide specific measures to offer tangible assistance to SMMEs.

4.1.9.13. While other stakeholders state that the Regulations do hinder entrance into the sector. This is attributed to ambiguity of the scope of reserved and unreserved postal services and registration fees that deter new entrants.

4.2. Question 2: What do you think are the contributing factors to the declining number of registered operators?

4.2.1. SAPO is of the view that the realisation by operators that they can operate without registration has promoted most new entrants to skip that requirement. Furthermore, there are no clear benefits to registration as opposed to not registering. SAPO therefore, proposes that there must be clear incentives to registration and equally clear impediments to not registering.

4.2.2. SAEPA submits that many 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 several SMMEs.

4.2.3. DHL Express submits that 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.

4.2.4. The Authority's Findings

- 4.2.4.1. With respect to the promotion of SMME's in the postal sector and the declining number of registered operators, the Authority found that stakeholders are of the view that the lack of awareness of legislation and the payment of applicable registration fees has led to a decrease in the introduction of new and registered SMME's.

DEFINITIONS

- 4.3. The Discussion Document recognises multiple efforts undertaken internationally to provide a definition that will give a better description of unreserved postal services. The PSA, which is the overarching legislation for postal services in the country provides a definition and description of the unreserved postal services in Schedule 2. The Discussion Document posed the following questions:

Question 3: Do you find the above definition (of unreserved postal services) enough for the current operations? Please elaborate.

- 4.3.1. SAPO submits that there is a matter before the Complaints and Compliance Committee which is brought precisely because the definition is apparently unclear, particularly whether the 0-1 kg prohibition applies with respect to the reserved market or to courier services.
- 4.3.2. DHL Express submits that courier and post are very distinct industries and courier companies are susceptible to market forces and are effectively regulated by the market. If the courier market is treated as part of the postal industry and regulated as such, then regulations should be promulgated in line with the legislative objective of the PSA. Without providing a suggestion for a definition of unreserved postal services, DHL Express supports the detailed submission by SAEPA on this issue.

- 4.3.3. SAEPA argues that the provision of the definitions on reserved and unreserved postal services in the PSA is the central regulatory barrier in unreserved postal services. The definition lacks clarity and the wording used causes uncertainty as items described under reserved services are repeated under the definition of unreserved services. However, no further description of postal articles falling outside the ambit of the reserved services is provided. Furthermore, the interpretation that conveyance of sub-1kg postal articles is exclusive to the sole reserved postal services licensee is not reflective of the reality and is an incorrect interpretation of the Legislature's intention.
- 4.3.4. SAEPA further submits that a version which is reflective of reality and a more realistic interpretation of the PSA consistent with international conventions which South Africa is a signatory would be that the two markets are distinguished by the form of conveyance. Whereby, postal articles (whether sub-1kg or above and up to 30kg) conveyed under unreserved would not bear an issued postage stamp, not collected through a roadside collection box and not addressed for delivery to an address box.
- 4.3.5. In addition to the definitions of reserved and unreserved postal services, SAEPA submits that it is not clear from the PSA what exactly comprises courier services but there is wide consensus that unreserved postal services comprise a much wider array of services, of which courier service is but a sub-segment.
- 4.3.6. SAEPA proposes the use of the definition of "courier" as provided by the United Nations Central Product Classification and the World Trade Organisation's General Agreement on Trade and Services ("GATS") which is *"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."* SAEPA submits that the meaning of address boxes as referred to in Schedule 1 of the PSA is not defined by the Act. It is not clear whether the PSA grants SAPO a monopoly over any "box" to which parcels may be

delivered for collection, such as collection lockers used by couriers. SAEPA is of the view that only address boxes to which post may be delivered (such as roadside address boxes and post office address boxes) are granted as monopoly for the reserved area of the SAPO Office.

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

- 4.3.7. SAPO submits that the Authority can intervene in setting and monitoring delivery standards (in terms of track and trace system and time deliveries) for unreserved operators. However, the Authority must first enquire the intention of the section and observe whether the intention was achieved. Furthermore, should the Authority intervene, the effectiveness of the section is entirely reliant on the capacity to effectively monitor, regulate and penalise. SAPO is of the view that monitoring and regulation is lacking.
- 4.3.8. DHL Express submits that market forces act as a power regulatory influence and the courier industry is motivated to provide exemplary services always. Furthermore, GATS obligations to courier services include no limitations on market access or national treatment. 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 suits them, which may have differing time frames for delivery.
- 4.3.9. SAEPA is the view that there is very little need, if any, for the Authority to impose regulatory or statutory standards. Prescribing minimum standards may inadvertently increase operator's costs and therefore increase price, drive participants out of the market and inhibit new entry.

4.3.10. In addition, SAEPA argues that 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 are dictated by market forces and the regular rules of competition and as such, 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 and the CPA. SAEPA also states that, all its members already provide the minimum standards imposed by Section 22 (d) of the PSA.

4.3.11. **The Authority's Findings**

4.3.11.1. The Authority found that all submissions are of the view that the definition for unreserved postal services is limiting for current operations in the unreserved area. Stakeholders argue that the challenge emanates from the understanding and implementation of the limitation of 1kg amongst stakeholders.

4.3.11.2. Furthermore, according to stakeholders, service standards such as delivery time frames, collection and delivery terms are dictated by market forces, regulatory intervention in this respect is seen as unnecessary and that it may be too restrictive.

4.3.12. **The Authority's Position**

4.3.12.1. The Authority will apply the definition in the PSA in its current form. Furthermore, the Authority will engage and recommend to the Ministry to address any changes that may result from the Bill being made law.

4.3.12.2. In terms of the Authority intervening in setting and monitoring delivery standards, the Authority accepts that in certain countries,

market forces dictate such standards. However, it is the position of the Authority that registration certificates must contain minimum standards. Minimum standards must pertain to time frames for collection and delivery and a track and trace system in line with the PSA and relevant Regulations.

LICENSING AND REGISTRATION

4.4. In the licensing and registration section, the Discussion Document provided the background of the process to register and spoke of the proposed licensing regime which includes licensing categories and obligations provided in the Bill. The Discussion Document posed the following questions:

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

- 4.4.1. SAPO submits that current application procedure is clear and not time consuming.
- 4.4.2. DHL Express considers the current licensing regime sufficient, as it does not impose obligations with respect to universal service. Further, license fees represent the proportional administrative cost of monitoring calculated in line with the employment costs for regulatory personnel.
- 4.4.3. SAEPA submits that the difference in licensing procedures for reserved and unreserved postal service providers is appropriate. However, the licensing fees may be burdensome for some SMMEs. The Authority must make it 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.

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

- 4.4.4. SAPO is of the view that the current three (03) year licence validity period is insufficient for business purposes as it is a truism that most new businesses require five (05) years just to reach breakeven and be sustainable. SAPO further states that coupled with investments that are required to reach that stage, three (3) years would appear to be inadequate for long term planning and longevity in the market. Lastly, SAPO states that the new categorisation of licenses will be helpful in setting realistic licence duration periods.
- 4.4.5. SAEPA submits that it does not have any objections to the current three (03) year licence validity period. However, given the substantial renewal costs involved, it may be beneficial for the industry, particularly SMMEs, if the licence validity period was extended to five (05) years with a commensurate increase, if any, of the renewal fees.
- 4.4.6. DHL Express has no objections to the three (03) year licence period if 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 licensees.
- 4.4.7. DHL Express argues that 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 be manifestly uncommercial. Companies that can offer consumers the best service would naturally grow, and this 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?

- 4.4.8. DHL Express is of the view that there should not be separate processes and fees for courier companies based on their size and scale, otherwise such would be manifestly uncommercial.
- 4.4.9. SAPO submits that international private postal operators and national postal operators should be categorised together and a similar registration and annual application fee should be applied. However, SAPO suggests that provincial postal operators together with municipal and metropolitan postal operators should fall under a separate category and different registration and annual application fees should apply.
- 4.4.10. SAEPA argues that the imposition and prescription of unreasonable licence conditions or fees may amount to a limit in market access and would be discriminatory, which is in breach of the GATS commitment by South Africa. In addition, SAEPA submits that it is not necessary for the Authority to have a 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 market for all operators is sufficient. Moreover, fees collected are to cover the Authority's administration and monitoring which SAEPA would expect to be the same for each operator irrespective of size, then the Authority would not need to extract different fees.
- 4.4.11. Considering the Bill, the intention to require both SAPO and unreserved postal services to provide mandatory insurance for postal articles is submitted by SAEPA to be discriminatory under the WTO agreement. Furthermore, SAEPA argues that such an obligation would require unreserved service providers to also become financial service providers or intermediaries in accordance with the South African Financial services sector laws such as the Financial Advisory and Intermediary Services

Act, 2002 (Act No. 37 of 2002), and increase costs and ultimately the price to the detriment of consumers.

4.4.12. DHL Express is of the view that there is no need for a mandate that a courier company offer insurance, as any insurance product would be subjected to the heavily regulated insurance market. A more sensible and appropriate requirement would be that courier companies offer the following:

- (a) Additional or enhanced liability;
- (b) Against an increased fee; and
- (c) On terms agreed with the customer.

4.4.13. **The Authority's Findings**

4.4.13.1. The Authority found that stakeholders are of the view that the licensing and registration process is efficient. However, the three (03) year validity period of the registration certificate is viewed as insufficient, and a proposal is to extend same to five (05) years for businesses to reach breakeven point and be sustainable.

4.4.13.2. Lastly, the introduction of further licensing categories and conditions as proposed in the Bill, is seen as cumbersome and unnecessary.

4.4.14. **The Authority's Position**

4.4.14.1. There is a need for improvement on the registration procedure. This will be achieved by including, but not limited to, application turnaround times, amending application forms to cater for notification of change of information, amendments, surrender and transfer of the registration certificate in line with section 21 of the PSA.

4.4.14.2. The Authority is of the view that the three (03) year validity period must be amended to a minimum of five (05) years. This will ease the financial burden that is associated with renewal costs, particularly for SMMEs to allow for growth and sustainability of same.

4.4.14.3. Further, this will align the validity period of postal registrations to other five (05) year services licensed by the Authority, such as class broadcasting services.

4.4.14.4. With respect to licensing categories and conditions mentioned in the Bill, the Authority will apply the PSA in its current form for this process. Any changes that may result from the Bill being made law will be addressed by the Authority accordingly at such point.

REGISTRATIONS FEES

4.5. The Discussion Document focused on the current fees payable by all unreserved postal services operators and took into consideration the Bill, which proposes that the Authority must determine the licensing fees. The Discussion Document posed the following questions:

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?

4.5.1. DHL Express supports the current licensing framework and does not see why there should be separate processes and fees for courier companies based on their size and scale.

4.5.2. SAEPA, submits that it does not have any objection to the current fee structure. It raises the concern 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.

4.5.3. SAPO is of the view that the application and renewal fee should be increased. SAPO further proposes that such fees be reviewed and that they be market related, applying the Malaysian model.

4.5.4. SAPO also argues that the registration fee must be scientifically calculated and applied taking into consideration the licence category, and percentage of the annual audited revenue generated.

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

4.5.5. DHL Express is of the view that licence fees should remain commensurate and proportional. Moreover, it proposes that the licence fee should be a fixed amount that represents the actual administrative costs which would apply equally to all licences.

4.5.6. DHL Express also raises a concern that 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 be clearly uncommercial. Further, DHL Express also states that a licence 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.

4.5.7. SAEPA disagrees with the proposal to have separate application and approval processes or classifications for unreserved postal service providers, based on the scale of their operations. SAEPA is of the view that the current single unreserved postal service market for all operators is sufficient.

4.5.8. SAEPA further states that it fails to understand the White Paper's proposal to impose different fees for operators based on the scale of their operations to cover the Authority's administrative and monitoring costs. SAEPA would expect such costs to be the same for each operator irrespective of size.

4.5.9. SAEPA, argues 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. SAEPA further posits that GATS 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. SAEPA states, *inter alia*, that the fees imposed should not be 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.

4.5.10. SAPO is of the view that the licence fee should be based on the size of the potential market. SAPO proposes that the licence fees should not be a barrier for entry for national, provincial and at municipal levels. Rather, licence fees should be determined per the market which the operator plays in.

4.5.11. **The Authority's Findings**

4.5.11.1. The Authority found different views on this matter. Some stakeholders do not oppose the current application, registration and renewal fees. However, others propose that the Authority's justification for fees must be to cover administration and compliance monitoring functions.

4.5.11.2. Other views state that the Authority must review the fees structure as the current fees might be a barrier for new operators to register. However, the Authority must not have separate application and approval processes or classifications for unreserved postal service providers based on the scale of their operations.

4.5.12. **The Authority's Position**

4.5.12.1. The Authority's position is that the fee structure must be reviewed taking into consideration that the current fees are outdated and do not take into consideration the current operational costs, as well as regulatory and compliance costs.

COMPLIANCE MONITORING AND ENFORCEMENT

4.6. All unreserved service operators are required to register with the Authority. Upon registration, the Authority issues a registration certificate which the operator is obliged to display in their premises for compliance monitoring purposes. Postal compliance inspectors conduct random visits to the operator's premises to monitor compliance with legislation and the Authority's regulations. The Discussion Document posed the following questions:

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

- 4.6.1. DHL Express has not necessarily provided a response on the Authority's effectiveness on the monitoring and enforcement of the Regulations in the unreserved postal services sector. However, DHL Express is of the view that the sector is effectively regulated by market forces. Thus, it proposes further liberalisation of the courier market.
- 4.6.2. SAEPA is of the view 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.
- 4.6.3. SAEPA further submits that there are areas where the regulatory environment needs 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.
- 4.6.4. SAPO is of the view that the Authority's monitoring and enforcement is not effective. It argues that due to a lack of appropriate and relevant primary and secondary legislation, the Authority cannot carry out its mandate effectively. Further, SAPO states there is insufficient

inspectorate presence in the market, auditing of operators and monitoring.

4.6.5. SAPO submits that there could be an argument made with respect to the unreserved market that the rationale for monitoring without ensuring that all players are licensed to participate is questionable. In other words, according to SAPO, once a player is licensed and appropriate fees have been rendered, what would be the usefulness of monitoring and enforcement?

4.6.6. Considering the arguments above, SAPO recommends the following:

- that the Authority urgently introduce new regulations aligned to the Bill;
- the strengthening of the Inspectorate to carry out monitoring and enforcement;
- to address the shortcomings in the market through regular stakeholder meetings between operators and the Authority; and
- stiff penalties for violations of the Regulations.

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

4.6.7. DHL Express is of the view that it is unnecessary and inappropriate to impose an obligation for registered operators in a market-driven industry such as courier services.

4.6.8. SAEPA is of the view that the availability of an avenue to report is certainly commendable, however, 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.

4.6.9. SAPO is of the view that enforcing compliance is the Authority's mandate, and therefore SAPO proposed that the Authority should strengthen the capacity of its Inspectorate. SAPO further proposes that any reporting of unlicensed operators by registered operator should not be mandatory but voluntary and should be viewed as an addition or support of the Authority's monitoring and enforcement.

4.6.10. **The Authority's Finding**

4.6.10.1. The Authority found that stakeholders are of the view that the Authority's compliance monitoring and enforcement is not effective and there are areas where the regulatory environment needs improvement. Some reasons posed by stakeholders are that there is a lack of appropriate and relevant primary and secondary legislation, making the Authority unable to carry out its mandate effectively. Further, there is insufficient Inspectorate presence in the market according to stakeholders. Therefore, some stakeholders propose the strengthening of the Authority's Inspectorate, while other views lean towards the liberalisation of the sector.

4.6.10.2. With regards to the obligation to report unregistered operators, stakeholders are opposed to same. The suggestion is for the Authority to establish an avenue for interested operators to report illegal operations but not impose it as an obligation to operators.

4.6.11. **The Authority's Position**

4.6.11.1. The Authority will not make it mandatory for operators to report unregistered operators, but voluntary reporting will be supported. Any registered operator that contracts with an unregistered operator is an accomplice in promoting illegal operations, and such an operator must be penalised.

UNIVERSAL SERVICE OBLIGATIONS AND FUNDING

- 4.7. The Discussion Document did not pose any specific question in relation to Universal Service Obligations and funding. Central to the discussion is the White Paper which proposes a creation of a Universal Services Fund ("USF") for postal services. The proposal is that an operator licensed to provide postal services shall contribute to the provision of universal services and/or contribute to the fund established by the Minister.
- 4.7.1. Submissions from stakeholders dealt with universal services issues as part of Question 1 above, which asked whether the Regulations have helped make progress towards the universal provision of postal services.
- 4.7.2. SAPO is of the view that the introduction of a USF as a necessity will offset bias in the provision of universal postal services. The view is informed by SAPO's acceptance that while players in the unreserved market have grown the sector, they are largely concentrated in urban and accessible markets. This leaves SAPO to service previously disadvantaged, remote and largely rural communities.
- 4.7.3. SAEPA argues that while the universal provision of postal services is a commendable objective, it is properly one that is to be met by public companies and funds rather than by private unreserved operators. SAEPA is of the view that unreserved postal service operators as an industry is distinct from national 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 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.
- 4.7.4. DHL Express submits that the national postal operator is a different kind of entity, having recourse to public funds and privileges that are derived from 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.

4.7.5. DHL Express further argues that private enterprises and courier companies already pay taxes towards the achievement of public aims. 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 public aims as a quid-pro-quo for being allowed to operate is far from what would be expected in a modern and forward-thinking economy.

4.7.6. **The Authority's Findings**

4.7.6.1. The Authority found that there are different views on this matter. Some stakeholders support the view of the establishment of the USF. On the other hand, other stakeholders oppose the view of universal service obligations and the establishment of the USF for unreserved postal services.

4.7.7. **The Authority's Position**

4.7.7.1. The Authority needs to assess issues of universal services and obligations mentioned in the Bill, if or when enacted into law. Furthermore, an important issue for consideration will be how to introduce regulatory parity in the provision of universal service obligations for unreserved postal services. Nevertheless, the Authority will apply the PSA in its current form for this process. Any changes that may result from the Bill being made law will be addressed by the Authority accordingly at such point.

CONTRAVENTIONS AND PENALTIES

4.8. The Discussion Document focused on suspension and cancellation of any operator's registration certificate, should an operator contravene the provisions of the PSA and licensing conditions. There is also the possibility of a fine or imprisonment when an operator refuses or fails to produce a licence or registration certificate for inspection or operate without a licence or registration certificate. The Discussion Document posed the following question:

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

- 4.8.1. DHL Express argues that the rationale for imprisonment as a potential penalty is unclear. Thus, it proposes that penalties should be proportionate to the level of the infraction such as actual damages suffered by third parties, and intent of the contravener. Provided the aforementioned principles are adhered to in actual levies, a penalty system extending up to R 250,000 would appear reasonable.
- 4.8.2. SAEPA submits that the provision regarding imprisonment is one that should be reconsidered. 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 considering the relevant factors such as the materiality of breach and effects of that breach on the market.
- 4.8.3. SAPO is of the view that the prescribed penalty fee is not suitable. SAPO argues that the penalty of R250,000 as per the regulation 4(4) of the Regulations, must be amended to one that will be applied as per the category of licence, on a percentage basis. Secondly, SAPO suggests that the fine in terms of section 80 (2) (b) of the PSA, of not exceeding R100 for every letter received, must be increased in accordance with current market related penalties.

4.8.4. **The Authority's Findings**

4.8.4.1. The Authority found that stakeholders have different views, some in favour of whilst others are opposed to the penalty fee as prescribed by the Regulations. Those who are opposed to the said penalty fee, state that the fine as per section 80 (2) (b) of the PSA (not exceeding R100 for every letter received) ought to be increased to align it to market related penalties. Whilst those in favour of the prescribed penalty fee state that the rationale for imprisonment as a potential penalty is unclear. Thus, it is proposed that penalties should be proportionate to the level of the infraction, actual damages suffered to third parties, and intent.

4.8.5. **The Authority's Position**

4.8.5.1. The Authority's position is that the section in the Regulations dealing with contraventions and penalties should be reviewed. This will take into consideration any other contraventions and penalties identified in this process and those that need to be amended.

5 CONCLUSION

5.1. The Authority would like to thank all participants for their inputs to this process. The Authority considered written submissions and findings above together with the current legislation and research conducted in the Discussion Document to come up with the positions provided above.

5.2. Considering the discussions and findings above, it is the position of the Authority that the Regulations are inefficient to address challenges of the unreserved postal services, due to reasons that:

- The registration process is inadequate for regulation of the sector;
- Fees payable are not applicable to the current environment;
- The duration of the registration certificate is inadequate.

- 5.3. Therefore, the Authority will review the Regulations. The review will be informed by the PSA as the Bill is still undergoing parliamentary processes and is not binding law.