



# Postal Article Forwarding Services (PAFS)

Regulating the delivery of postal articles

## Consultation Document

Document reference	MCA/C/18-3376
Date of publication	16 <sup>th</sup> November 2018

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## 1. Background and Purpose

eCommerce has facilitated the way consumers in Malta can purchase items from abroad. As a result more people in Malta are using the Internet to purchase items from retailers overseas,<sup>1</sup> resulting in a significant increase in the delivery of postal articles (letter packets and parcels) to consumers in Malta.

When items are purchased online from retailers overseas the delivery to the consumer in Malta is dependent on the options made available by the retailer. The retailer may provide for the delivery of the items via a cross-border postal service or in some cases cross-border delivery may not be an option at all (i.e. delivery may be limited to the country where the retailer is established).

When purchasing items online from retailers overseas, consumers in Malta may be in a position to avail themselves of an alternative delivery service - referred to as Postal Articles Forwarding Services (PAFS).<sup>2</sup> Such services, which have emerged from the significant growth in eCommerce and changing consumer purchasing habits, are distinct from conventional end-to-end cross-border postal services<sup>3</sup> and work by introducing a third party to the postal delivery chain.

A PAFS operates by providing a customer with a delivery address in the country of the retailer where the PAFS provider receives the item purchased on behalf of the customer. The PAFS provider then re-ships the item to the customer in Malta, either by post via an established postal operator, or via its own delivery network. PAFS operators providing the delivery of items purchased online by their customers from overseas retailers include, for example, SendOn, ShipLowCost, YouShop...We Ship! and BoxNotch. A host of PAFSs are also available by providers operating in other countries and executing the delivery of postal articles to Malta, on the behalf of the customer, via a cross-border postal service provided by an independent postal operator.

This document consults on the MCA's view that a PAFS operator in Malta that uses its delivery network to distribute the items purchased by its customers from an overseas retailer constitutes a postal service, and therefore requires an authorisation under the Postal Services Act, Cap 254<sup>4</sup> of the laws of Malta (hereafter referred to as 'the Act'). The document also consults on the type of authorisation required by a PAFS operator for the delivery of postal articles in Malta.

This consultation will run from the **16<sup>th</sup> November 2018** to the **14<sup>th</sup> December 2018**. Please refer to **Section 4** for further details about the submission of comments.

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<sup>1</sup> As reflected in the EU 2018 Digital Economy and Society Index (DESI) in 2017 64% of local internet users purchased items online.

<sup>2</sup> Also referred to as 'Parcel' or 'Packet' Forwarding Services as these services have emerged mainly to cater for the delivery of goods purchased online from foreign retailers, other than an item of correspondence.

<sup>3</sup> A customer (the sender) in country A buys a postal service to convey an item from country A (outgoing) to country B (incoming). The postal operator in country A is supplying the collection portion (of a postal article originating from the sender in country A) of an end-to-end postal service supplied 'into country B' and the postal operator in country B is providing the delivery portion (i.e. to the recipient in Country B) of the same end-to-end postal service.

<sup>4</sup> Refer to: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8748&l=1>

## 2. Legal Basis

Article 2 of the Act defines a 'postal service' as a service involving 'the clearance, sorting, transport and distribution of postal articles, provided that the provision of a service of transport alone shall not be considered as a postal service'.

Article 2 of the Act defines a 'postal article' as 'an article addressed in the final form in which it is to be carried by a postal operator', and further states that 'in addition to articles of correspondence, such articles include books, catalogues, newspapers, periodicals and postal parcels however described, including packages containing merchandise with or without commercial value'.

A postal article is considered to be an article weighing not more than 31.5kg since heavier items cannot be handled by a single average individual without mechanical aids and therefore such an activity forms part of the freight transport and the logistics sector rather than the postal sector. This is clearly reflected in Recital 16 and Article 2 of the Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services.<sup>5</sup>

Article 2 of the Act defines a 'postal operator' as 'any person authorised to supply one or more postal services as defined in the Act in Malta and other countries and includes any person who carries on within or outside Malta any business activity relating to postal services including any services that are ancillary to postal services'.

In these circumstances, an undertaking is classified as a 'postal operator' if it provides one or more steps in the postal value chain (i.e. clearance, sorting, transport and distribution) and if the service or services thus provided relate to a postal article. However if its business consists merely in the provision of transport services, this is not considered as a postal service.<sup>6</sup>

Article 2 of the Act defines 'cross-border mail' as 'mail to or from another country'. In addition, Regulation 2 of the Postal Services (General) Regulations 254.01<sup>7</sup> (hereafter referred to as 'the Regulations') defines 'incoming' as 'a postal article received through the post from a place outside Malta for delivery to any place in Malta. 'Outgoing' when applied to a postal article of any description, is defined as 'a postal article posted in Malta for onward transmission through the post to a place outside Malta'

In line with the Article 8 of the Act an authorisation to operate or provide postal services is required:

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<sup>5</sup> Refer to: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0644&from=EN>

<sup>6</sup> As clarified by the CJEU C-259/16 & 260/16 (notably in the Conferta, AICAI v. AGCOM decision of 31 May 2018) a company which provides even just one phase of a postal service (clearance, sorting, transport and delivery of postal articles) is considered as providing postal services (although providing transport services alone would not be sufficient to be considered as a postal service).

<sup>7</sup> Refer to: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9662&l=1>

- in respect of services within the scope of the universal service in order to guarantee compliance with the essential requirements<sup>8</sup> and to ensure the provision of the universal service by an individual licence granted by the MCA in accordance with the Act;
- in respect of services outside the scope of the universal service in order to guarantee compliance with the essential requirements, by a general authorisation notified to the MCA in accordance with the Act.

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<sup>8</sup> As defined in Article 2 of the Act, 'Essential Requirements' refers to non-economic reasons which can be imposed on the supply of postal services within and outside the scope of the universal postal service. These reasons, amongst others, include the confidentiality of correspondence and the security of network as regards the transport of dangerous goods.

### 3. Postal Article Forwarding Services (PAFS)

This section describes a typical PAFS and presents the MCA's view that a PAFS provider in Malta who uses its delivery network to distribute items purchased by its customers from an overseas retailer, constitutes a postal service. This section also presents the MCA's view on the authorisation requirements required by a PAFS operator providing the delivery of postal articles in Malta.

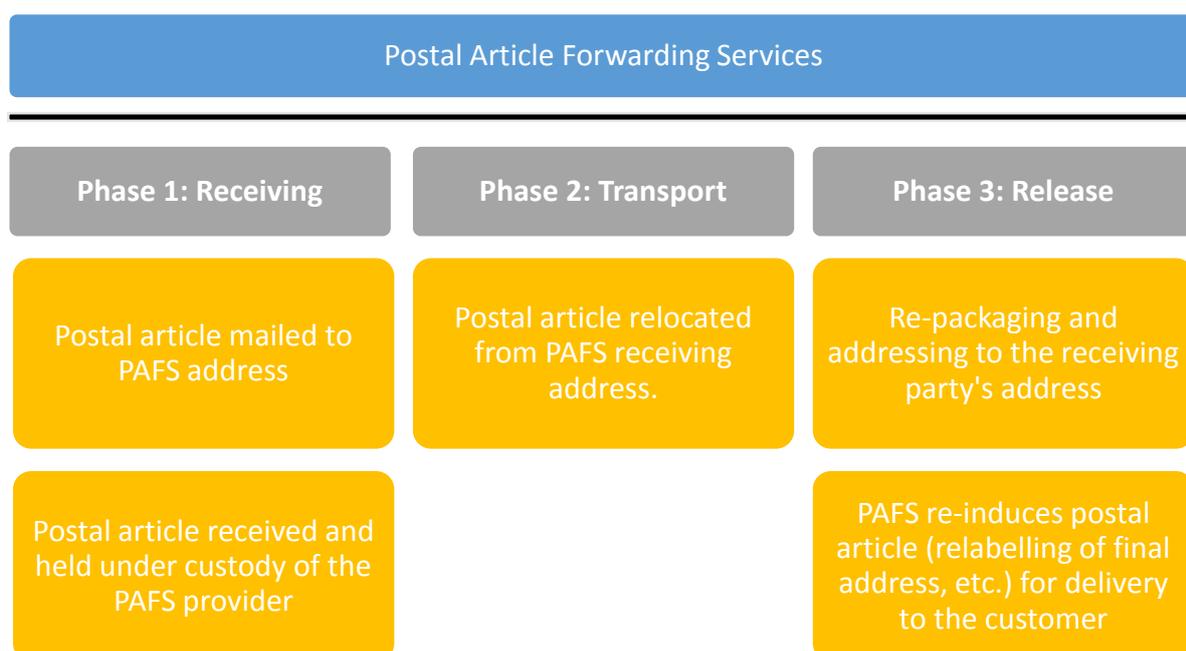
#### 3.1 Delivery of items purchase online via a PAFS

A customer of a PAFS enters into a contractual agreement whereby s/he is provided with a unique identifier and an address to which the overseas retailer delivers the item purchased by the customer. From here, the PAFS, acting as an intermediary, will collect and ultimately deliver the items received from the retailer to the customer in Malta.

Items which are, during the course of the agreement, addressed to the customer at the PAFS provider's receiving address are subsequently held under the custody of the PAFS provider. The PAFS provider, as agreed with the customer, is responsible for making arrangements for the item to be conveyed and delivered to the customer of the PAFS.

The delivery of an item by a PAFS provider, as agreed with the customer, may take place either by a postal service by means of an independent postal operator, or by the PAFS provider itself. A PAFS provider may also provide various different value-added services (such as repacking and consolidating multiple parcels/packets into one shipment, modes of delivery, payment methods for delivery, tracking, etc.).

A PAFS typically involves three phases - (1) the receiving phase, (2) the transport phase, and (3) the release phase - as illustrated in the diagram below.



### Phase 1 - Receiving

A PAFS provider allocates its customers a unique identifier and a receiving address in the originating country. Items are delivered by the retailer to that address in the customer's name, either via personal delivery (i.e. directly transported by the retailer to the receiving address) or via a postal service. The address given by the consumer to the retailer, for the delivery of the items, is the receiving address provided to the customer by the PAFS provider.

Once the item is received at the PAFS' receiving address and accepted by the PAFS provider, on behalf of the customer, the rights and obligations of the retailer (and if sent via a postal service, the obligations of the postal operator) become fulfilled. Accordingly any postal service in the originating country is terminated at that point. The retailer has delivered the item to the receiving address provided by the consumer and these are now in the custody of the PAFS provider.

At this stage the PAFS provider becomes the sole party responsible for the item as agreed to with the customer. The PAFS provider temporarily holds the item in its premises before executing any additional instructions for the conveyance and delivery of the item as agreed to with the customer.

The delivery of the item by a postal operator at the PAFS' receiving address, and acceptance of the postal article by the PAFS provider, represents the termination of a postal service - i.e. from the retailer, as the sender of the postal article, to the premises of the PAFS provider as the recipient. At the same time this marks the beginning of another process, whereby the PAFS provider initiates the process to convey and deliver the item to the customer as agreed to with the latter. This aspect is tackled in Phases II and III below.

### Phase II - Transportation

After the item is delivered to the receiving address in the originating country and is in the custody of the PAFS provider, some form of transportation leading to the delivery of the item, in agreement with the customer, is required. The transportation may include the conveyance of the item by the PAFS provider: (1) from the receiving address to an access point of an independent postal operator for conveyance via a postal service to the customer in Malta;<sup>9</sup> or (2) from the receiving address to the access point of the PAFS provider in Malta for the conveyance and delivery of the postal article to the customer via its own delivery network.

### Phase III - Release

When the item is conveyed to the access point of the PAFS provider in the destination country, the release of the item from the custody of the PAFS provider can take place according to the arrangement agreed to with the customer.

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<sup>9</sup> A PAFS provider may use an independent postal operator to deliver the postal article to the addressee in the destination country. Such PAFS providers' normally offer different options for the delivery of postal articles - such as via ordinary mail service or an express mail service.

When the PAFS provider itself carries out the release of the item to the customer - i.e. the delivery of the postal article in Malta to the address indicated by the customer, which may also be an alternative delivery point such as a parcel locker<sup>10</sup> - the PAFS provider is carrying one or more of the steps in the postal value chain. The PAFS provider is also in control over the postal delivery service (such as delivery personnel, quality of service, price, terms and conditions, etc.). The PAFS provider is clearly providing a postal service.

### 3.2 Regulating the delivery of postal articles

An entity providing one or more steps in the postal value chain (although its business cannot consist merely in the provision of transport services) is providing a postal service and therefore requires an authorisation under the Act.

The Act distinguishes between postal services outside and within the scope of the universal postal service. This distinction is important because the type of authorisation (an individual licence or general authorisation) and related obligations that may be imposed on a postal operator, regarding the postal services it provides, depends on the category that the services fall into.<sup>11</sup>

#### *Distinguishing between services within and outside the scope of the universal service*

A postal service may be regarded as falling within the scope of the universal postal service, if from a user's perspective, it displays interchangeability to a sufficient degree with the universal postal service.

The universal postal service includes one delivery on every working day to each postal address or other delivery point and at least one clearance from each access point. The delivery and clearance applies to all postal articles which weigh up to 20 kilograms. The universal postal service covers both inland and cross-border services - i.e. the distribution of 'incoming' postal articles originating from a postal operator in a foreign country for delivery in Malta and the handing over of 'outgoing' postal articles to the postal provider in the foreign country for delivery. The universal postal service in Malta is provided by MaltaPost as the designated universal service provider.<sup>12</sup>

Having regard to the provision of Article 17B(1) of the Act, it is apparent that the central issue in determining whether a postal service falls within the scope of the universal postal service is one of substitutability of services. If a postal service matches the description of the universal postal service (Article 17 of the Act), then it is a postal service within the scope of the universal postal service, but even if it does not fully match the description of the universal postal service, then it may still be a postal service within the scope of the universal postal service. If the service does not involve a clearance or distribution on every working day, or if it is not provided on a nationwide basis, or if it is not provided

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<sup>10</sup> A parcel locker forms part of the options for last mile delivery of postal articles to the recipient (the addressee).

<sup>11</sup> Refer to PART IV (Authorisations) of the Regulations and the [Application Form](#) required to provide service both within and outside the scope of the universal postal service.

<sup>12</sup> Postal Services (Designation of Universal Service Provider) Order, 253.13

at an affordable price in accordance with a uniform tariff applicable throughout Malta, then it still maybe a postal service within the scope of the universal postal service.

Article 17B(1)(c) makes it clear that the key determinant is an assessment of demand-side substitutability - i.e. whether or not a 'postal service user' would view a particular service as being 'reasonably interchangeable' with a service provided by MaltaPost as part of its universal postal service. If the two services are 'reasonably interchangeable' then it is correct to conclude that the postal service falls 'within the scope of the universal postal service'. If the two services are not 'reasonably interchangeable' then one may only conclude that the postal service does not fall 'within the scope of the universal postal service'.

EU Law also suggests that an additional three categories of postal services cannot be considered to be universal postal services. These being:

- new services (i.e. services quite distinct from conventional services);<sup>13</sup>
- services with value-added features (in whatever form it takes);<sup>14</sup> and
- services provided under individually negotiated contracts.<sup>15</sup>

#### *Delivery of postal articles purchased online from foreign retailers*

When an item is purchased online from an overseas retailer by a consumer in Malta, the delivery of the item is dependent on the retailer. The retailer may provide for the delivery of the item to the consumer in Malta via an end-to-end cross-border postal service (which may be a postal service falling within or outside scope of the universal postal service). However in some cases cross-border delivery to the consumer in Malta may not be an option available by the overseas retailer. Hence the consumer's decision regarding the cross-border delivery of an item purchased online is constrained by the delivery options provided for by the retailer.

In the case of a conventional end-to-end cross-border postal service the retailer (as the sender of the postal article) requests the service of a postal operator in its country to deliver the postal article directly to the consumer (the recipient) in the destination country for delivery via a local postal operator. The

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<sup>13</sup> Recital 21 to the First Postal Services Directive "Whereas new services (services quite distinct from conventional services) .... do not form part of the universal service".

<sup>14</sup> The ECJ in Case C-320/91 Corbeau [1993] ECR I-2533 at point 19, observed that "the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit ....". Also Recital 18 to Directive 97/67/EC observes that "the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers".

<sup>15</sup> The ECJ in Case C-357/07 TNT Post UK Ltd decided on the 23 April 2009 - point 48 - observed that "it is apparent [from recital 15 to Directive 97/67] that the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of universal service provision".

local postal operator completes the 'inbound' delivery of the postal article to the consumer in Malta on behalf of the overseas postal operator.<sup>16</sup>

When a conventional cross-border postal service is used by a retailer for the delivery of items to a recipient in Malta, the characteristics of the end-to-end cross-border postal service determine whether the inbound cross-border postal service provided by the postal operator in Malta (acting on behalf of the overseas postal operator) is providing a service that falls within or outside the scope of the universal postal service. If the postal service used by the retailer for the delivery of items to the consumer in Malta displays the characteristics of a postal service that falls within the scope of the universal postal service then the delivery of the postal article by the postal operator in Malta (i.e. the distribution of the incoming postal articles in Malta) is deemed to be reasonably interchangeable with the universal postal service.<sup>17</sup>

A PAFS serves a distinct purpose where the intended use of such a service is for the delivery of items purchased online to the consumer in Malta, mainly in those instances when the delivery options provided for by the retailer do not fulfil the delivery needs of the consumer. A PAFS therefore eliminates the worst possible outcome for a consumer purchasing goods online from an overseas retailer - that of a consumer interested in purchasing an item from a retailer overseas not being in a position to place an order as the item cannot be delivered to his/her address in Malta.

When a PAFS provider uses an independent postal operator for the delivery of items to the consumer in Malta (which may be via a service which falls within or outside the scope of the universal postal service), the PAFS provider is not providing a postal service but is merely acting as an intermediary. The PAFS provider is holding the items temporarily on behalf of the customer prior to initiating the delivery to the customer via a postal operator. In such a scenario the PAFS provider can be seen as the sender of the postal article which is to be conveyed and delivered to the customer's address via a conventional end-to-end postal service provided by an independent postal operator. The characteristics of the postal service used by the PAFS provider determines whether the postal operator entrusted with the delivery of the postal article in Malta is providing a service that falls within or outside the scope of the universal postal service.

On the other hand, when the PAFS provider itself executes the release portion of the postal article to the address indicated by the customer in Malta (i.e. the delivery of the postal article to the customer in Malta), the PAFS provider is providing one or more of the steps in the postal value chain. In addition

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<sup>16</sup> The postal operator in country A has directly contracted with the sender and undertakes the clearance, transport, sorting of the postal article in country A (outgoing cross-border) and entrusts the postal operator in country B for the steps in the postal delivery chain in country B (incoming cross-border). The postal operator in country B handles the transport, sorting and distribution of the postal article in country B on behalf of the postal operator in country A.

<sup>17</sup> Reference is made to the judgement of the Administrative Review Tribunal (Rikors No 217/2012 – DHL International Limited vs. MCA) which states that “even though the Applicant Company (referring to DHL Malta) only delivers parcels originating from Deutsche Post, it is still rendering a postal service which involves the clearance, sorting, transport and distribution of postal articles, which service is not an express mail service, since, amongst other things, it lacks the main characteristics which renders it such, that is the specific intention of the sender that his parcel be delivered by express mail service, but is a service which falls under the scope of the universal service since it is ultimately interchangeable and substitutable to a universal service”.

the PAFS provider is in control over the postal delivery service (delivery personnel, quality of service, price, terms and conditions, etc.). In such a scenario a PAFS cannot be seen as mere intermediation but as forming an integral part of an overall postal service.

From the perspective of the customer the intended use of a PAFS can be seen as a value-added delivery service that enables the cross-border delivery of the items purchased online, in those situations where delivery options available by the retailer do not fulfil the needs of the consumer in Malta. Therefore from the perspective of the customer the delivery of postal articles by a PAFS provider would not be considered as being reasonably interchangeable with the cross-border delivery options offered by the retailer. In addition, from the perspective of the overseas retailer, a PAFS does not in any way affect its decision on the modes of delivery of items purchased online, as the cost of delivery is typically borne by the consumer. Stated otherwise, higher PAFS usage would not lead to a reduction in the choice of delivery options offered by the retailer. Hence from the retailer's perspective a PAFS is clearly not reasonably interchangeable with the delivery options it provides to the consumer.

#### *Delivery of postal articles by the PAFS provider is essentially distinct from a universal postal service*

The MCA is of the opinion that the delivery of postal articles by the PAFS provider, via its own postal delivery network, is quite distinct from a conventional end-to-end cross-border postal service and is also essentially distinct from a universal postal service.

The postal delivery service provided by a PAFS provider to its customers in Malta cannot be considered to be reasonably interchangeable with an incoming cross-border universal postal service. Such PAFS providers' carrying out the delivery of postal articles in Malta are providing a postal service that falls outside the scope of a universal postal service.

#### *Authorisation requirements for the delivery of postal articles by a PAFS provider*

Like other postal operators in Malta providing only services outside the scope of the universal postal service, PAFS providers that provide for the delivery of postal articles in Malta should be authorised by a general authorisation notified to the MCA in accordance with the Act.<sup>18</sup> Postal operators licenced to provide postal services within the scope of the universal postal service are automatically authorised to provide services outside the scope of the universal postal service.<sup>19</sup>

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<sup>18</sup> See Regulation 48 of the Regulations which states that 'any person who intends to provide postal services outside the scope of the universal services shall, before doing so, notify the Authority of his intention to provide such services'.

<sup>19</sup> See Regulation 46 of the Regulations which deals with the licensing of services within the scope of universal services.

Postal operators providing only services that fall outside the scope of the universal postal service are subject to a light-touch regulatory regime and are only required to notify the MCA<sup>20</sup> with the following information requirements:<sup>21</sup>

- the name of the postal operator and details of the company;<sup>22</sup>
- a clear description of the postal service(s) provided (including the quality of service);
- the estimated date of commencement for the relevant activity;
- the geographical area intended to be covered by the service in question;
- a signed declaration of compliance with the relevant conditions as prescribed under the Act and the Regulations;
- details of the postal operator's complaint handling procedures;<sup>23</sup> and
- details of mail integrity procedures aimed at minimising the exposure of postal articles conveyed by postal operators to the risk of loss, theft, damage and/or interference<sup>24</sup> (if not yet developed then they are required to be drawn up and provided to the MCA within two months from data of commencement of the relative activity and thereafter maintained subject to adequate mail integrity procedures).

In addition, postal operators are required to provide quarterly statistics regarding volumes and revenues of the postal services offered, or as may be determined by the MCA.<sup>25</sup>

The MCA maintains a register of authorised postal operators accessible via its website.<sup>26</sup> The register contains a list of all postal operators authorised to provide postal services in Malta. Information about postal operators and their services is important in supporting the MCA's work in effectively regulating

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<sup>20</sup> Refer to the MCA's [Notification Form](#) to provide solely postal services that fall outside the scope of the universal postal service.

<sup>21</sup> Regulation 48 (Notification) of the Regulations.

<sup>22</sup> In line with Regulation 48 the postal operator is required to provide the full name, business address and contact details of the person concerned including, in the case of a corporate body (i) the company registration number and, (ii) where the business address differs from the address of its registered office, the address of the registered office.

<sup>23</sup> In line with Regulation 7H of the Regulations all authorised postal operators must have appropriate procedures in place for dealing with complaints by users, in particular in cases involving loss, theft, damage or non-compliance with quality of service standards.

<sup>24</sup> In line with Regulation 66 of the Regulations all authorised postal operators must have appropriate procedures in place to ensure the integrity of mail. Refer to MCA's 2006 [Decision](#) on the minimum standards for protecting the integrity of mail.

<sup>25</sup> In line with the Act all postal operators are required to provide all information required by the MCA in order for the MCA to be in a position to ensure conformity with the Act and for clearly statistical purposes.

<sup>26</sup> See <https://mca.org.mt/sites/default/files/pageattachments/2018.10.04%20Register%20-%20Postal.pdf>

the postal sector in Malta, and is also used to empower consumers in making informed choices when using postal services.

An annual authorisation fee amounting to €150 is applicable to postal operators authorised to provide services that fall outside the scope of the universal postal service and if its annual gross revenue from the provision of postal services exceeds €24,300.<sup>27</sup>

### 3.3 Way Forward

The use of PAFS as means to facilitate the delivery of items purchased online from retailers overseas to a consumer in Malta, including the number of providers operating such services both in Malta and in other jurisdictions, have increased over the past years. PAFSs play an important role in facilitating the cross-border delivery of items purchased online by consumers in Malta from retailers overseas.

For the MCA to be in a better position to exercise regulatory oversight of the postal sector in Malta, PAFS providers' delivering postal articles in Malta should be appropriately authorised as postal operators providing services outside the scope of the universal postal service.

The MCA will be in a position to ensure that PAFS providers' delivering postal articles in Malta abide by their obligations relating to the provision of postal services as specified in the Act.

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<sup>27</sup> First Schedule of the Regulations.

#### 4. Request for Comments

The MCA welcomes written comments and representations to this report during the national consultation period, which shall run from the **16<sup>th</sup> November 2018** to the **14<sup>th</sup> December 2018**.

Having analysed and considered the comments received, the MCA will publish its decision on the authorisation requirements for the delivery of postal articles by PAFS providers' that will, *inter alia*, summarise the responses to the consultation.

The MCA appreciates that respondents may provide confidential information in their comments. This information is to be included in a separate annex to their response and should be clearly marked as being confidential.<sup>28</sup>

For the sake of openness and transparency the MCA will publish the names of all respondents to this consultation. To this end, all representations may be published, except where respondents indicate that a response, or part of it, is confidential. The MCA will take steps to protect the confidentiality of all such material from the moment that it is received at the offices of the MCA. Respondents should however avoid applying confidential markings wherever possible.

All responses must be submitted to the MCA by no later than close of business of the **14<sup>th</sup> December 2018**.

All responses to this consultation should be clearly marked "**Postal Article Forwarding Services – Regulating the Delivery of Postal Articles**" and sent by post, facsimile or e-mail to:

**Chief, Policy and Planning**

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<sup>28</sup> In accordance with the MCA's confidentiality guidelines and procedures:  
[https://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL\\_0.pdf](https://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL_0.pdf)