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Dear Sirs and Mesdames

COMMENTS ON THE DRAFT REGULATIONS ON THE CONVEYANCE OF MAIL, 2024

1. INTRODUCTION

- 1.1 The South African Express Parcel Association (**SAEPA**) is grateful for the opportunity to provide comments on the Draft Regulations on the Conveyance of Mail, 2024 (**Draft Regulations**). The Draft Regulations were published in Government Gazette No. 51316 on 27 September 2024 pursuant to section 61(d) of the Postal Services Act, No. 124 of 1998 (**Postal Services Act**) read with section 4(3)(j) of the Independent Communications Authority of South Africa Act, No. 13 of 2000 (**ICASA Act**).
- 1.2 SAEPA comprises member companies engaged in the express freight and courier industry. Large multinational operators are members of SAEPA as well as South African companies of varying sizes and accordingly the association is representative of service providers throughout the express supply chain.

- 1.3 In the interests of an efficient and sustainable industry, SAEPA maintains specialist committees which meet regularly to evaluate developments affecting service providers, end users and third parties, and to liaise with the relevant authorities.
- 1.4 The implications of the Draft Regulations are of particular interest and relevance to SAEPA's members, and SAEPA would accordingly like to use this engagement opportunity to set out its general observations on the overarching scheme of the Draft Regulations, before addressing the specific provisions of the Draft Regulations.
- 1.5 Should the process of finalising the Draft Regulations involve further stakeholder engagement, SAEPA would appreciate the opportunity to participate in, and contribute further to, any upcoming stakeholder engagement sessions.
- 1.6 Through this process, SAEPA hopes to continue to foster a strong collaborative working relationship between its members and the Independent Communications Authority of South Africa (**ICASA**), and to ensure that the Draft Regulations are fit-for-purpose and capable of practical application by ICASA and those to whom they apply.

2. GENERAL COMMENTS ON THE DRAFT REGULATIONS

- 2.1 By way of summary, SAEPA has the following general comments on the Draft Regulations:
- 2.1.1 Basis of the Draft Regulations: SAEPA understands that the Draft Regulations should be:
- 2.1.1.1 confined to matters related and incidental to the conveyance of postal articles, the general powers and duties of conveyors, legal

possession or ownership of postal articles for purposes of contravention of the Postal Services Act, and mail fraud and theft;¹

2.1.1.2 consistent with the regulation of postal matters in the public interest and for that purpose:

2.1.1.2.1 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;

2.1.1.2.2 encourage investment and innovation in the postal industry;

2.1.1.2.3 promote the development of postal services in a manner that is responsive to the needs of postal users and consumers;

2.1.1.2.4 protect the interests of postal users and consumers; and

2.1.1.2.5 ensure compliance with international commitments;²

2.1.1.3 in line with section 4(3)(j) of the ICASA Act, which states that ICASA may make regulations on any matter consistent with the objects of the ICASA Act and the underlying statutes or that which is incidental to or necessary for the performance of the functions of ICASA; and

2.1.1.4 in line with section 2(bA) of the ICASA Act, which states that the object of the Act is to, inter alia, regulate postal matters in the public interest in terms of the Postal Services Act.

2.1.2 It is against this backdrop that SAEPA has considered the Draft Regulations and makes its submissions to ICASA.

¹ Section 61(d) of the Postal Services Act.

² Section 2 of the Postal Services Act.

2.1.3 Definitions: The Postal Services Act contains the following important definitions which are applicable to the Draft Regulations:³

2.1.3.1 "mail" means every article collected for conveyance by post and includes loose and individual articles and every mail bag, vessel or conveyance of any kind by which postal articles are carried, whether or not it contains any such articles and every person conveying or delivering mail or postal articles (emphasis added);

2.1.3.2 "conveyor" means a person or licensee whose business is to carry, transfer or deliver mail from a sender to an addressee or displayed address;

2.1.3.3 "postal article" means any letter, postcard, reply postcard, letter card, envelope, book, packet, pattern or sample packet or any parcel or other article when in the course of transmission by post, and includes a telegram when conveyed by post (emphasis added); and

2.1.3.4 "postal service" means a reserved postal service or an unreserved postal service as contemplated in Schedule 1 and Schedule 2, respectively.

2.1.4 Application:

2.1.4.1 The Draft Regulations state that they apply to all "conveyors" of "mail". As the term "conveyor" relates to the conveyance of "mail" (and "mail" is in turn defined with specific reference to the conveyance of articles by post), it appears that the Draft Regulations do not apply to providers of courier services (or indeed express logistics services), including SAEPA's members, as such service providers convey various articles by means other than by post.

³ Regulation 1 of the Draft Regulations states that any word or expression to which a meaning has been assigned in the Postal Services Act has the meaning so assigned, unless the context otherwise specifies.

Instead, the Draft Regulations in their present form appear to apply to providers of postal services only (i.e., the South African Post Office (**SAPO**)).

2.1.4.2 Should it be ICASA's intention, through the Draft Regulations, to attempt to collapse the material distinction between postal services and courier services and/or express logistics services, SAEPA respectfully submits that this is inconsistent with the Postal Services Act as well as with the Universal Postal Convention (**UPC**) and the World Trade Organisation's (**WTO**) General Agreement on Trade in Services (**GATS**). It may also have the practical effect of raising barriers to entry and participation for couriers and express logistics service providers, including those which are small, medium and micro-enterprises (**SMMEs**), by introducing unnecessarily burdensome obligations on such service providers.

2.1.4.3 The comments which follow at section 3 will accordingly address SAEPA's general concerns regarding the scope of application of the Draft Regulations. Thereafter, from section 4 onwards, the comments will consider the implications of the specific obligations created by the Draft Regulations should they be applied to courier services and/or express logistics services, notwithstanding that SAEPA maintains that (i) the Draft Regulations do not appear to extend to such services by virtue of the language of the Regulations, and (ii) attempting to 'bundle' such services with postal services in this manner would be contrary to the scheme of the Postal Services Act, the UPC and the GATS and is accordingly unlawful and irrational.

3. **REGULATION 3: SCOPE AND APPLICATION OF THE DRAFT REGULATIONS**

3.1 As noted above, Regulation 3 of the Draft Regulations states that the Regulations apply to all "conveyors" of "mail". For the reasons set out at

paragraph 2.1.4.1, SAEPA respectfully submits that this does not appear to extend to providers of courier services and that this should be made more explicit in the Draft Regulations. Such a position finds recognition in the Postal Services Act.

- 3.2 As ICASA will of course be aware, SAEPA has consistently maintained that, correctly interpreted, the Postal Services Act (i) confers upon SAPO a monopoly to convey those items described in Schedule 1 to the Postal Services Act by means of postal service (i.e., where the relevant item bears a stamp and has been deposited in a roadside collection box for delivery to an address box or post office box), but (iii) nevertheless permits couriers and express logistics services providers (including SAEPA's members) to also convey such items, albeit by means other than a reserved postal service (i.e., by courier service).
- 3.3 Indeed, this issue is the subject of ongoing litigation in terms of which ICASA's interpretation of the scope of the statutory monopoly conferred on SAPO in respect of reserved postal services under the Postal Services Act is being subject to judicial review. While such litigation is not immediately relevant for present purposes, SAEPA does wish to emphasize the importance of the Draft Regulations not seeking to undermine, or introduce additional interpretational challenges in respect of, the distinction between postal services and courier services and/or express logistics services. Such distinction is established in terms of the relevant empowering legislation as well as being reflected in other sources, such as the UPC and the GATS, and should be expressly maintained in the Draft Regulations.
- 3.4 The UPC, for example, provides clarification on this point insofar as it contemplates, within the context of the regulation of service standards in Universal Postal Union (**UPU**) member countries, the provision of universal postal services "*involving the permanent provision of quality basic postal services at all points in [member countries' territories] at affordable prices*". Within the framework of member countries' national postal legislation, member countries are obliged to set out "*the scope of the postal services offered and the*

requirement for quality and affordable prices, taking into account both the needs of the population and their national conditions". Albeit within the context of a description of the nature of a universal postal service, this sheds light on certain characteristics associated with the provision of postal services by designated operators (i.e., by "*national postal operators tasked by their government to fulfil the government's obligations under the UPU treaties*"⁴) which are distinct from the provision of courier services by private operators. Extending the types of obligations associated with providers of postal services pursuant to the UPU to providers of courier and/or express logistics service providers in terms of the Draft Regulations is misplaced.

- 3.5 With reference to the GATS, it is notable that it clearly distinguishes between courier services (CPC 7512) and postal services (CPC 7511) in the following manner:

"Definition of courier services: In the Services Sectoral Classification List, subsector 2B on courier services is cross referenced to UN CPC item 7512 which contains two subitems: (1) 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 (2) other courier services for goods, not elsewhere classified, e.g. trucking or transfer services without storage, for freight.

Definition of postal services: In the Services Sectoral Classification List (MTN.GNS/W/120), subsector 2A on postal services is cross-referenced to item 7511 in the provisional United Nations Central Product Classification (UN CPC) (Series M. No. 77, 1991). This item contains four subitems: (1) postal services related to letters consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed matters, whether for

⁴ <https://www.upu.int/en/partner-with-us/who-we-work-with/governments-and-designated-operators>.

*domestic or foreign destinations; (2) postal services related to parcels consisting of pick-up, transport and delivery services of parcels and packages, whether for domestic or foreign destinations; (3) post office counter services rendered at post office counters, e.g. sales of postage stamps, handling of certified or registered letters and packets, and other post office counter services; and (4) other postal services which includes mailbox rental services, "poste restante" services, and public postal services not elsewhere classified (except postal giro and postal savings accounts which are classified in UNCPC under "services of monetary intermediaries"). The explicit presumption of the UNCPC is that all the above represent services are supplied by national postal administrations. There might also be a relation between postal services provided by wholly government entities and the GATS Article I provision excluding government functions. Postal services of a Member, whatever the status of the postal supplier, would be services covered by the GATS so long as, and which is usually the case, they are supplied on a commercial basis."*⁵

- 3.6 It is apparent from the above that the GATS contemplates postal services and courier services as patently different services, and the nature of WTO Member States' sector-specific commitments in respect thereof are clearly informed by such distinction. By way of example, in the case of South Africa, it has not made any commitments in respect of market access or national treatment in respect of postal services (i.e., those services undertaken by "*national postal administrations*", in this case SAPO) but it has undertaken to refrain from imposing market access or national treatment restrictions in relation to the commercial presence of courier services). That is, the nature of the respective definitions of courier services and postal services in the Services Sectoral Classification List and the willingness of South Africa to make market access and national treatment commitments in respect of each, is reflective of the material differences in these services.

⁵ [w39.doc](#).

- 3.7 In addition to speaking to the significance of the distinction between postal and courier services (which distinction should, accordingly, be upheld in the Draft Regulations), the fact that South Africa has made market access and national treatment commitments in relation to courier services is also notable insofar as, pursuant to Article VI of the GATS, WTO Member States are required not to apply their domestic regulation in such a manner that may nullify such sector-specific commitments and/or constitute unnecessary barriers to trade in services.
- 3.8 Article VI contemplates the Council for Trade in Services developing disciplines to prevent “*measures relating to qualification requirements and procedures, technical standards and licensing requirements*” from becoming “*unnecessary barriers to trade in services*” and these disciplines are intended to ensure that such measures are (i) based on objective and transparent criteria, such as competence and the ability to supply the services, (ii) not more burdensome than necessary to ensure the quality of the services, and (ii) in the case of licensing procedures not in themselves a restriction on the supply of the service. Such criteria provide useful standards against which to evaluate the specific obligations created in terms of the Draft Regulations, which specific obligations may impede the entry and participation of both domestic and foreign courier service providers by (i) curtailing the scope of activities in which they may engage (e.g., in relation to the provisions prohibiting the delivery of dangerous goods), and/or (ii) introducing unnecessarily burdensome regulatory requirements which impede their operational efficiency.
- 3.9 The submissions that follow will interrogate these specific obligations created by the Draft Regulations and assess their potential impact on courier and/or express logistics service providers. Such submissions are accordingly premised on the assumption that the Draft Regulations are intended to apply to courier and/or express logistics service providers, notwithstanding that SAEPA maintains that the scope of application of the Draft Regulations does not in fact extend to such operators and ought not to be extended to such operators.

4. **REGULATION 4: GENERAL POWERS AND DUTIES OF A CONVEYOR**

- 4.1 Regulation 4 of the Draft Regulations requires conveyors to establish minimum terms and conditions that include various provisions. Amongst these is the requirement to establish and maintain internal procedures, standards, and policies concerning redress for loss and damage to postal items.⁶ SAEPA's members are concerned that "postal items" is not a defined term in the Draft Regulations nor the Postal Services Act, which may cause confusion regarding its meaning. Although its meaning may be inferred from the context of the Draft Regulations, it may be helpful to stakeholders if this were clarified so as to set out what exactly is meant when referring to this term, particularly given that the terms "mail" and "postal article" are already defined terms. That is, the use of a different term ("postal items") may suggest that something more than, or different to, mail and postal articles is intended.
- 4.2 Conveyors are also required to notify the sender of mail within a reasonable period of their inability to deliver the mail on time. Such notification may include, among others, a radio announcement.⁷ SAEPA's members are of the view that this option should be removed from the Draft Regulations given how onerous it is. Instead, it should be satisfactory for a conveyor to notify the sender using the contact details which a sender has provided to the conveyor as a preferred method of communication (e.g., SMS, email or telephone).
- 4.3 The requirement regarding making an radio announcement is in itself very revealing insofar as it seems more suited if required from a provider of postal services such as SAPO, which collects mail from anonymous senders to be delivered by means of a postal system (e.g., roadside collection boxes, a stamp system for payment, no defined service levels or time periods etc., and no collection of sender details in most cases). This is all very different from a courier service, which is what SAEPA's members provide. SAEPA's members record the contact details of every sender and are quite capable of communicating with

⁶ Regulation 4(1)(e).

⁷ Regulation 4(5) and (6).

them individually, should the need arise, without having to resort to shotgun announcements over the radio which SAPO may need to resort to.

5. REGULATIONS 7, 8 AND 9: COMPENSATION, INSURANCE AND REBATE FOR DELAY OF DELIVERY OF EXPRESS MAIL

5.1 While most of SAEPA's members already offer the services referred to in Regulations 7, 8 and 9 or variations thereof, there is an apprehension that these requirements will place significant barriers to entry to SMMEs and contractors, such as owner drivers, who may not be as well resourced and able to provide value-add or ancillary services or measures such as compensation, insurance and rebates.

5.2 SAEPA's members are of the view that the amount payable for compensation for loss and/or damage to mail should be capable of limitation by conveyors as opposed to being equal to the replacement value declared by the customer. In this regard, a scale/threshold as to the limitation should be implemented based on the declared replacement value of the mail (e.g., up 80% of the replacement value for mail above a certain value, etc.). This is especially important in circumstances where the mail is uninsured as the risk assumed by the conveyors could be inordinately high, especially where high value mail/postal articles are concerned.

5.3 It is also particularly onerous to require conveyors to pay a rebate to the sender for a failure to deliver express mail, with the only exception being where the delay is due to force majeure. SAEPA's members are of the view that the list of exceptions should be extended to included instances where the delay was occasioned through-

5.3.1 no fault of the conveyor; and

5.3.2 the fault of the sender (e.g., wrong address provided).

6. **REGULATION 10: SECURITY OF MAIL**

- 6.1 SAEPA's members are not opposed to having a relatively standardised security plan in relation to the security of relevant premises, the safety of personnel and the use of vehicles and equipment in the conveyance of mail. To cater for all different types and levels of private sector service providers, some of whom may be SMMEs and owner drivers, SAEPA's members recommend the inclusion of the word "reasonable" before "security plan" in Regulation 10(1).
- 6.2 Regulation 10(2)(c)(i) is overly prescriptive and onerous, in particular for SMMEs and owner drivers, who may struggle to implement measures such as alarms/intrusion detection systems and surveillance equipment. Even insofar as this does not affect existing players in the market, it would most certainly serve as a barrier to entry for potential new entrants to the market who may not have the facilities and/or resources to implement such measures.
- 6.3 Accordingly, it may be worth reconsidering this Regulation to set the minimum standards at an achievable level, such as those measures listed in Regulation 10(2)(c)(ii) and (iii), i.e., limiting access to authorised personnel only and having locking mechanisms and key controls in place. The implementation of any additional security measures ought to be the prerogative of individual service providers based on their needs and abilities. Once more, the standard required of conveyors should be reasonableness which should permeate throughout the Draft Regulations where conveyors are required to develop and maintain various standards (i.e., security procedures, security plans, data protection measures, etc.).

7. **REGULATION 12: MAIL OPERATIONS SECURITY**

- 7.1 The requirement to have a digital register specifically is similarly onerous, as is the requirement contained in Regulations 14(3) – (5) and 15(2) – (4). SAEPA's members acknowledge that the National Integrated ICT Policy White Paper, 2016, which outlines the postal policy for South Africa, embraces digitization and convergence in the postal sector. However, it may be fairer to require that

conveyors develop and maintain a register which need not necessarily be digital but with the aspiration of eventually digitizing their operations (for those who cannot immediately implement digital platforms to that extent). This allows for conveyors at different levels and capacities to ensure their activities remain compliant with the Draft Regulations.

8. REGULATION 17: CONTRAVENTION AND PENALTIES

8.1 SAEPA's members are of the view that the Draft Regulations should provide for a dispute resolution mechanism regarding contraventions and penalties. Conveyors should have recourse in terms of disputing an alleged contravention and appealing decisions that find them guilty of having contravened the Regulations, including where this results in the imposition of penalties.

9. CONCLUSION

9.1 SAEPA trusts that ICASA will find value in the input contained in this submission, and SAEPA stands ready to assist ICASA further in its formulation of practical, fit-for-purpose regulatory instruments that are capable of realising the objectives of the Postal Services Act and the ICASA Act.

9.2 Kindly note that SAEPA is consulting with its members concerning oral submissions and will revert to ICASA in this regard during the week of 2 December 2024.

Yours sincerely



Garry Marshall

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