

Brussels, 18 April 2011

Green Paper on the modernisation of EU public procurement policy – Reply to the Commission’s questionnaire

Introduction

PostEurop

PostEurop is the association which represents the interest of 49 European public postal operators. Committed to supporting and developing a sustainable and competitive European postal communication market accessible to all customers and ensuring a modern and affordable universal service, PostEurop promotes cooperation and innovation bringing added value to the European postal industry. Its members represent 2.1 million employees across Europe and serve to 800 million customers daily through over 175,000 counters. PostEurop is also an officially recognised Restricted Union of the Universal Postal Union (UPU).

The consultation

Amongst regulatory issues, public procurement is of high relevance for postal operators. Hence, the application and the development of the EU public procurement are of utmost importance to PostEurop and its members.

PostEurop welcomes the Commission consultation and takes this opportunity to present its view on selected aspects thereof.

Reply to selected questions

Scope of the Utilities Directive

10. *Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.*
- 10.1. *If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.*

PostEurop believes that the European Commission shall consider the exclusion of the postal sector from the scope of application of the Utilities Directive.¹

¹ Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

Currently, the Utilities Directive applies to activities relating to the provision of postal services consisting of the clearance, sorting, routing and delivery of postal items.² According to the Utilities Directive,³ postal services may comprise any postal services which are, or may be, reserved on the basis of Article 7 of the Postal Directive,⁴ as well as other postal services which may not be reserved on the basis of the same provision.

In addition to the postal services mentioned above, the Utilities Directive covers services ancillary to postal services and, in particular, mail service management services (services both preceding and subsequent to despatch, such as mailroom management services); added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail); services concerning postal items such as direct mail bearing no address; financial services, including in particular postal money orders and postal giro transfers; philatelic services; and finally logistics services (services combining physical delivery and/or warehousing with other non-postal functions), on condition that such services are provided by an entity which also provides postal services and that such services are not directly exposed to competition on markets to which access is not restricted.⁵ All these services are provided in markets which are *de jure* open to competition and *de facto* very competitive. They fall under the Utilities Directive only insofar as they are provided by a postal operator. This creates a situation in which, in respect of the same service, some operators are subject to public procurement rules and other are not.

Contracts awarded by contracting entities providing postal services were made subject to the (current) Utilities Directive following the reorganisation of the public procurement rules in 2004. This was justified by the need to take into account the further opening up of Community postal services to competition at that time, creating a framework for sound commercial practices and allowing greater flexibility than it was offered by the then new Public Sector Directive.⁶

In the context of the same reform, the telecommunications sector which was previously covered by Utilities Directive 93/38/EEC was removed from the scope of the Directive and is no longer subject to the EU public procurement rules. This choice was justified by the fact that the sector-specific legislative framework had completed the full market opening,

² Article 6(2)(b) of the Utilities Directive. Pursuant to Article 6(2)(a), a postal item is an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight.

³ Article 6(2)(b), second indent, of the Utilities Directive.

⁴ Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14), as subsequently amended.

⁵ Article 6(2)(c) of the Utilities Directive.

⁶ Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114.)

introducing effective competition in the sector. Indeed, as explained by the Commission,⁷ the constraints imposed on contracting entities operating in telecommunications sector were introduced because of the lack of competition resulting from the State's decision to grant a monopoly or a privileged position to an operator (exclusive or special rights). In return for this preferential treatment by the State, the operators concerned had to comply with certain advertising and procedural requirements when awarding contracts. Those constraints were no longer justified following the liberalisation, since the sector had been subjected to competitive forces adequate enough to ensure its commercial character operation. Furthermore, the Commission noted that the regulatory process of telecommunications in the EU was centred on the National Regulatory Authorities ("NRAs"), which would provide the necessary interface for implementing EU principles. As a consequence of the above progress, the Commission considered that it was no longer necessary to regulate purchases by entities operating in that sector.

In this respect, it is worth noting that the Commission accepted that liberalisation had occurred and effective competition existed in most Member States, despite the fact that some Member States still benefited from transitional periods as regards the implementation of the telecommunications regulatory package.⁸

Against this background, PostEurop submits that it is necessary to consider the full market opening of the liberalised postal sector with a view to deciding whether the constraints the Utilities Directive impose on contracting entities are still justified.

There are three milestones in the EU postal *acquis*. The first and the second Postal Directives,⁹ which followed the 1992 Green Paper, set in motion the process of a controlled liberalisation and gradually opened the market to competition. The third Postal Directive¹⁰ confirmed the obligation of Member States to abolish exclusive rights in the postal field and set a deadline for the full market opening by 31st December 2010 for the majority of Member States (in fact, 95% of the EU postal markets in terms of volumes¹¹) and by 31st December 2012 for the remaining Member States.¹² As for the telecommunications sector, the existence of a transition period for some Member States does not affect the conclusion that full competition in the postal sector is developing across the EU. In any case, by the entry into force of the new public procurement rules, the transition period would be over and full market opening achieved in all the EU postal markets.

⁷ Commission Communication of 11 March 1998 "Public Procurement in the European Union", COM (98) 143.

⁸ See Communication from the Commission pursuant to Article 8 of Directive 93/38/EEC (OJ C 156, 3.6.1999, p. 3).

⁹ Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14) and Directive 2002/39/EC of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002 p. 21).

¹⁰ Directive 2008/6/EC of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3).

¹¹ Commission Report on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), COM(2008) 884 of 22.12.2008.

¹² Pursuant to Article 3 of the third Postal Directive, 11 Member States may postpone full market opening until 31 December 2012.

Furthermore, as the experience with the application of Article 30 procedures shows, an increasing number of postal services are already excluded from the scope of application of the Utilities Directive. In the six “postal” decisions adopted by the Commission until now, it has been acknowledged that the legal and regulatory environment permits access and competition in a variety of postal services (as well as ancillary services) markets, and that postal operators in the markets concerned are subject to competitive pressure. As such, they need not be subject to the Utilities Directive. This was the case for a number of markets in Denmark,¹³ Finland,¹⁴ Italy,¹⁵ Sweden,¹⁶ and Austria.¹⁷

In the light of the above, PostEurop submits that account should be duly taken of the changes that have occurred in the postal sector and of the new factors that are emerging on the market. At the crossroads between communications, advertising and transport, the postal sector is evolving substantially. Physical mail is increasingly being supplemented by multi-channel delivery and tailor-made solutions for customers. Postal operators are confronted with a market which is wider than the traditional postal operation's, where competition (from both the demand and the supply sides) is increasingly coming from electronic messaging services. While this is still to be reflected in the current market definitions, substitution to electronic modes of communication puts a disciplinary force on postal operators market behaviour and needs to be taken into account.

As noted already in the 2008 Commission Report on the application of the Postal Directive, “[a]t the end of the first decade of the new millennium, postal operators are facing fierce competition from electronic means of communication. (...) Moreover, with the continuous opening of the postal services markets, the incumbent postal operators are also facing increasing competition from new entrants”.¹⁸ Against this background, the radical changes of the competition environment should bring the Commission to reconsider, in the short-medium term, the traditional market definition in a much broader perspective.

¹³ (BtB) parcel services, domestic and international, light goods/pallet goods services, domestic and international, courier and express services, domestic and international (Commission Decision 2007/169/EC of 16 March 2007).

¹⁴ Unaddressed direct mail advertising, standard parcel services (BtB and BtC), national and international, express and courier parcel services, domestic and international, light goods services (also called single consignments) and freight services, contract logistics, philatelic services (Commission Decision 2007/564/EC of 6 August 2007).

¹⁵ Express and courier services, domestic and international (Commission Decision 2008/383/EC of 30 April 2008).

¹⁶ Some of non priority letter services (large sorted non- priority shipments elsewhere in Sweden than in metropolitan areas; including the so-called “e-brev” (i.e. hybrid mail) services, distribution of non-priority newspapers and addressed direct mail), to domestic consumer standard parcel services (BtB, BtC, CtC and CtB), domestic express and courier parcel services, international parcel services (BtB, BtC, CtB, CtC), domestic pallet services, philatelic services, third and fourth party logistics (including import, warehousing and distribution as well as direction, control and development of the customer's flows of goods) (Commission Decision 2009/46/EC of 19 December 2008).

¹⁷ Standard parcel services, domestic and international (BtB and BtC), domestic express parcel services, combined freight services (i.e. freight services relating to consignments consisting of individual parcels and palletised small packages), contract logistics (including the storage of goods and associated stock management, finishing and/or commissioning, marshalling goods ready for dispatch and address management for the sender) (Commission Decision 2010/142/EU of 3 March 2010).

¹⁸ Report from the Commission to the Council and to the European Parliament on the application of the Postal Directive, COM(2008) 884 final of 22/12/08.

In conclusion, as a result of the liberalisation process in the postal sector, the introduction of fully-fledged sector-specific regulation and the evolution of the market, PostEurop submits that it is no longer necessary to regulate purchases by entities operating in the postal sector. Thus, PostEurop supports the exclusion from the scope of the Directive of postal entities, in the same way as private entities which base their decisions on purely economic criteria.

11. Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

PostEurop acknowledges that the Utilities Directive has contributed to the introduction of a more flexible and workable regime for public utilities in the postal sector. The application of public procurement obligations was justified on the basis of the exclusive rights (reserved area) which were in place in most Member States. Irrespective of their ownership, postal operators were subject to the Utilities Directive in as much as the exclusivity of their operation precluded other entities from entering the relevant market under substantially the same competitive conditions.

The removal of the reserved area, as mandated by the third Postal Directive, will not yet exclude all postal operators from the scope of application of the Utilities Directive, as the latter will still apply to all those operators who maintain the status of “public undertakings” under current Article 2(1)(b) of the Directive.

Therefore, PostEurop understands that the abolition of exclusive rights will automatically determine the exclusion from the scope of the Utilities Directive of privately-owned postal operators, while maintaining public owned operators within its scope. This creates discrimination towards those operators which, while acting pursuant to national private law, are still subject to the public procurement regimes due to their public ownership and may entail a discriminatory treatment based on the (public/private) ownership of the undertakings, which may not be in line with Article 345 TFEU.

Therefore, PostEurop invites the Commission to consider whether the status of public undertakings should stand as the sole criterion upon which the application of the Utilities Directive stand, once special and exclusive rights are abolished.

Article 30 procedure

13. Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

Both full market liberalisation and the competitive developments of the last years call for reconsideration, in principle, of the applicability of the Utilities Directive to the postal sector. In the previous answers, PostEurop has invited the Commission to reconsider both the need for maintaining the postal sector within the scope of the Utilities Directive and, in the affirmative, the need for maintaining under the Directive public undertakings which do not enjoy special or exclusive rights.

Nevertheless, should the forthcoming Utilities Directive ultimately apply to postal operators still, PostEurop maintains that the Article 30 procedure should be preserved as a fundamental tool for guaranteeing the necessary flexibility in those situations where the application of the public procurement rules is not justified, due to the existence of a – *de jure and de facto* – competitive market.

Within this framework, PostEurop maintains that the criterion of direct exposure to competition under Article 30 shall be interpreted with the necessary flexibility, taking the objectives of the Directive and the characteristics of the specific postal market concerned into account.

Past performance

25. *Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?*

PostEurop believes that the award criteria should take into account all elements which demonstrate the capacity of the bidder to perform the contract in better terms and conditions.

Past performance is generally linked to the technical ability of the bidder and it is qualified as a selection criterion. However, PostEurop considers that previous experience with the contracting authority goes beyond the selection requirements and should also be considered as an award criterion.

For assignments which require a high degree of trust – and this is generally the case of public utilities and in particular with reference to postal services – previous positive experience with the contracting authorities does constitute a further guarantee that the bidder is able to perform the assignment at the highest standards.

On the other hand, negative past performance (e.g. where a given supplier has failed to perform to an acceptable standard) could be taken into account amongst the selection criteria, as a possible cause of rejection.

In this respect, discrimination risks may be tackled by applying strict transparency rules and allowing recognition of previous experience with other contracting authorities for similar assignments.

Specific tools for utilities

26. *Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?*

PostEurop recognises that the Utilities Directive provides useful procedural tools which guarantee additional flexibility for contracting entities (e.g. qualification systems and periodic indicative notices) and consider that these tools should be maintained in the future regime.

Procurement in the case of non-existent competition/exclusive rights

60. *In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?*

61. *If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?*

By definition, exclusive rights exclude competition in a specific product or service market. However, exclusive rights may be justified when this is required in the public interest.

PostEurop believes that the issue of exclusive rights should be assessed within the context of Article 106(2) TFEU, which allows these rights to be enacted or maintained to the extent that it is necessary to guarantee the performance of an operation of services of general economic interest and that they do not affect the development of trade to such an extent as would be contrary to the interests of the Union. This provision provides Member States with the necessary flexibility in maintaining or introducing exclusive rights where strictly necessary, while imposing clear limits to their discretionary powers.

As these principles take precedence over EU public procurement legislation, PostEurop considers that there is no need that the maintenance or the exercise of exclusive rights be subject to further specific legislation.

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Please note that PostEurop is available to expand on any of the above issues. For further queries, please contact:

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