

# Position on the evaluation of the EU public procurement directives



PostEurop<sup>•</sup>

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## ABOUT POSTEUROP

POSTEUROP is the association which represents European postal operators since 1993 and is officially recognised as a Restricted Union of the [Universal Postal Union \(UPU\)](#).

It is committed to supporting and developing a sustainable and competitive European postal communication market accessible to all citizens and ensuring a modern and affordable universal service.

Its Members employ **1.6 million people** and deliver billions of items annually to over **295 million homes** and **48 million companies** across Europe.

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## CONTEXT

Amongst regulatory issues, **public procurement** is of high relevance for postal operators. PostEurop Members welcome the Commission consultation<sup>1</sup> on the evaluation of three legislative acts that regulate public procurement in the EU ('how to buy'): Directives [2014/23/EU](#) (the Concessions Directive), [2014/24/EU](#) (the Public Procurement Directive) and [2014/25/EU](#) (the Utilities Directive). The application and the development of the EU public procurement are indeed of much importance to PostEurop Members.

PostEurop Members are primarily concerned by the Utilities Directive, which applies to different postal segments and because a number of postal operators qualify as "public undertaking".

As a consequence, PostEurop will focus its input mainly on that piece of legislation for the consultation.

### Context of the Utility Directive

As part of the legislation relating to public procurement – which is i.a. applicable to the public undertakings – a special regime was introduced by the **Utilities Directive** out of the need to accommodate the specific nature of the activities of seven utility activities<sup>2</sup> in the Member States, for which markets were often (or still can be) closed and not yet (fully) liberalized. Since government influence was often highly present in these sectors, the aim was to prevent a distortion of competition as a result of this government influence affecting the procurement policy of the entities providing these specific services. However, to meet the large differences that existed in the Member States regarding the degree of government influence or liberalization on these markets, it

<sup>1</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Public-procurement-directives-evaluation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Public-procurement-directives-evaluation_en)

<sup>2</sup> (i) gas and heat, (ii) electricity, (iii) water, (iv) transport services, (v) ports and airports, (vi) postal services and (vii) the extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

<sup>3</sup> The flexibility of this special regime is reflected in, amongst others, additional exclusion grounds that preclude certain contracts from the application of public procurement legislation, a simpler use of the negotiated

procedure with a prior call for competition, shorter deadlines for the submission of requests for participation or tenders, a wider possibility for the formulation of (qualitative) selection criteria and the means of proof thereof.

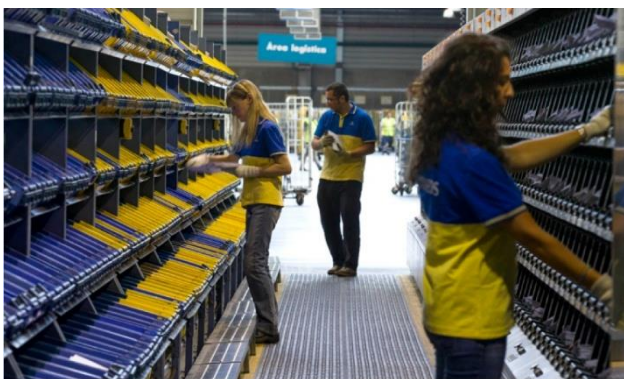
was decided to introduce a more flexible regime<sup>3</sup> as compared to the regime in the "classic public procurement sector". Besides, this special regime is also considered to be a transitional regime pending the overall liberalization of these sectors in the Member States. The telecommunications sector can serve as an example for this purpose. It used to be included as one of the relevant activities in the utilities sector to which the special Utilities regime applied. Considering that effective competition was introduced (*de jure and de facto*) in this telecommunications sector, this sector was removed from the material scope of application of this special regime (utilities).<sup>4</sup> Even more, the EU legislator also introduced in the "classic regime" a specific exclusion ground in the field of electronic communications/telecommunications to ensure that these activities would not be subject to the public procurement rules of the "classic regime" either.



<sup>4</sup> See Consideration (5) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [i.e. the predecessor of Directive 2014/25/EU].

## Position of PostEurop Members to the consultation

The Utilities Directive i.a. applies to activities relating to the provision of “postal services”, which consist of the clearance, sorting, routing and delivery of “postal items”<sup>5</sup>. In addition, the Utilities Directive also covers “other services than postal services”, in particular (i) mail service management services<sup>6</sup> and (ii) services concerning postal items such as unaddressed mail.



It is worth reminding that the Utilities Directive has already evolved over the time and that the following services offered by postal operators were removed from its scope of application: added-value services linked to and provided entirely by electronic means, financial services<sup>7</sup>, philatelic services and logistics services (services combining physical delivery and/or warehousing with other non-postal functions).<sup>8</sup>

Moreover, the Utilities Directive is not applicable to activities that fall under the scope of a relevant utility activity (such as “postal services” or “other services than postal services”) if a Member State or a public undertaking having introduced a request to the Commission can demonstrate that the activity in question that is performed in said Member State is directly exposed to competition on markets to which access is not restricted.<sup>9</sup>

Numerous exemptions have been granted in the past years illustrating the need for reform of the regime with respect to the postal industry. If the exception tends to become the rule, the rule needs to be adapted to the changed reality.<sup>10</sup>

In its recent decisions on exemption requests, the Commission recognizes that, when the Directive 97/67/EC was implemented (which is the case in all Member States), the access to the market should be deemed not to be restricted. And for the vast majority of postal services (e.g. express mail delivery, domestic or international parcels delivery services (standard or express), domestic or international courier services, unaddressed mail, mailroom services, ...) for which an exemption was requested, the Commission – acknowledging there was sufficient competition – granted an exemption from the Utilities Directive to the requesting entity.

With regard to the postal services that are still subject to the Utilities Directive, PostEurop Members would like to stress that these services are provided in markets which are *de jure* open to competition and *de facto* very competitive. In the parcels market, where there are no or low barriers to entry, we observe much innovation, new market entrants – with new business models – as well as platforms that vertically integrate in the market. In the letter business, competition is very fierce, either on specific types of mail segments (like international mail, registered mail, business mail, etc), or as postal operators attempt to compete with digital alternatives and therefore the competitive pressure stemming from cheaper digital alternatives should be taken into account.

<sup>5</sup> Article 13 of the Utilities Directive. A ‘postal item’ means 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.

<sup>6</sup> Services both preceding and subsequent to despatch, including mailroom management services.

<sup>7</sup> Including in particular postal money orders and postal giro transfers

<sup>8</sup> Article 6(2)(c) of the previous Utilities Directive

<sup>9</sup> Articles 34 and 35 of the Utilities Directive

<sup>10</sup> [https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/exempt-markets\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/exempt-markets_en)

Apart from the fact that the level of competition reached in the various postal markets generally no longer justifies the postal sector being subject to the Utilities Directive, other elements argue in favour of a total exemption for the postal sector (from the Utilities Directive and the Classic Sector Directive).

- The postal operators fall under the Utilities Directive only insofar as they are provided by a “public undertaking”. This creates a situation in which, in respect of the same service, some historical postal operators are subject to public procurement rules and others – including (mainly) non-European large platforms – are not, which can be considered as **discriminatory** and undermines the objective of developing a single European market.
- The Utilities Directive creates an **unreasonable excessive administrative burden**, extra costs and lengthens procurement deadlines for the entities subject to it. Postal operators can witness that the application of public tender rules by no means guarantees a sourcing at competitive conditions but more often than not just increases costs by leading to a sub-optimum outcome (*e.g.*, potential bidders refrain from bidding due to the cumbersome process and costs linked to the bid preparation). In this context, the introduction of the Foreign Subsidies Regulation only increased the administrative burden and costs also for the public undertakings. Therefore, the automatic application of public tender law already increased (and is going in future) the cost of the universal postal obligation and (the need for) a financing by the state. This context explains the numerous requests for exemption of postal operators in the last years. If operators were satisfied with the current legal framework, they would not undertake the administrative burden and cost to request such an exemption.

- It also creates a **confidentiality problem** for the operators concerned, whose (strategic) purchasing plans become publicly visible. This creation of an artificial transparency on highly competitive markets potentially has the effect of distorting competition by making tacit collusion easier. This also potentially leads to unfair competition between operators who are subject to public procurement rules and those who are not.



## Conclusion

As a result of the full liberalization process in the postal sector and the evolution of the market which has become very competitive, PostEurop Members submit that it is no longer necessary to regulate purchases by entities operating in the postal sector. In sum, the postal operators are exposed to a level of competition which ensures that, also in the absence of the procurement discipline brought about by the detailed procurement rules laid down in Directive 2014/25/EU, procurement for the pursuit of the activity concerned will be carried out in a transparent and non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one. As previously expressed<sup>11</sup>, **we support 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. Furthermore, we ask the Commission to provide a **specific exclusion for postal services in the classical regime** in order to avoid that some postal operators would have to apply the more stringent classical regime for their postal services, after being exempted from the application of the Utilities Directive. Indeed, this cannot be the purpose.

Lastly, if postal operators should not anymore be subject to the special and classical sectors regime, there is also no longer any reason to subject them to the scope of the 2014/23 Directive on concessions. Consequently, postal operators should also be exempted from this directive.

PostEurop Members will be happy to follow and contribute to the Commission analyses in view of the potential revision of the Utilities Directive and enter a dialogue with the relevant stakeholders in this process.



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<sup>11</sup> PostEurop Green Paper on the modernisation of EU public procurement policy - Reply to the Commission's questionnaire (18 April 2011)

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