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# Administrative Order No 87/2024, Bundesnetzagentur Official Gazette 18/2024 of 18 September 2024

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September 2024

## **Provisional order pursuant to section 96 of the Postal Act (PostG): temporary authorisation to provide postal services pending a final decision on the application for inclusion in the provider register pursuant to section 4 PostG**

1. Anyone who, in accordance with section 4(2) sentence 2 PostG, has used the online application form (available at [www.bnetza.de/EN/Areas/Post/ProviderRegister/start.html](http://www.bnetza.de/EN/Areas/Post/ProviderRegister/start.html)) to request entry in the register of postal service providers (provider register) may provisionally, pending the final decision on the application, provide postal services without being listed in the provider register.
2. Until the final decision on the application has been made, applicants authorised under point 1 may be contracted by or contract other providers to provide postal services. In this case they must immediately notify the Bundesnetzagentur in writing of the name and address of their contracting entity or contractor.
3. Points 1 and 2 do not apply to applicants who submit a new application to the Bundesnetzagentur for inclusion in the provider register after having been previously denied inclusion in the register pursuant to section 4(4) PostG or after they have been deleted from the provider register on the basis of a decision pursuant to section 4(5) PostG.
4. The temporary authorisation under points 1 and 2 expires with the final decision on the application in question. The same applies if the application is withdrawn or if the application is otherwise taken care of.
5. This general administrative order applies until 30 September 2025.
6. In accordance with section 97 sentence 4 PostG in conjunction with section 41(4) sentence 4 of the Administrative Procedure Act (VwVfG), this general administrative order is deemed to have been made public on 19 September 2024, the day following its publication on the website of the Bundesnetzagentur and its publication in the Bundesnetzagentur Official Gazette.

# Reasoning

## I.

The Postal Legislation Modernisation Act was published on 18 July 2024 and entered into force one day later. It contains major changes for providers of postal services. The previous licence and notification requirements were replaced by the provider register. Providers must be entered in the provider register to be allowed to provide postal services. Providers who operate only postal outlets or automated stations are exempt from this requirement.

During the period from 19 July to 5 September 2024 the Bundesnetzagentur had already received around 2,000 applications to be included in the register.

## II.

The orders in points 1 to 5 are issued on the basis of section 96 PostG after due assessment of the circumstances. Under this provision the Bundesnetzagentur may take provisional measures pending the final decision.

### 1.

With the order re point 1 the Bundesnetzagentur grants those who have submitted an application for inclusion in the provider register permission to provide postal services on a provisional basis without being in the provider register. By doing so it ensures that the currently anticipated processing time for applications does not result in an applicant effectively being temporarily prohibited from practising their profession, which could lead to irreversible damage up to and including insolvency for individual applicants.

The order is suitable and necessary to limit the above risks at least temporarily. It is also reasonable since it clearly does not violate the rights of third parties, in particular: those of providers who are already in the provider register or who are still authorised to provide postal services on the basis of transitional provisions. This right is not restricted by point 1 of this administrative order.

The order ensures that all applicants can be examined in accordance with section 4(3) PostG regarding their reliability, resources and expertise as soon as the application is complete. The order only authorises the applicants to provide postal services temporarily during the application procedure so that the long processing time of the applications does not result in the applicant effectively being prohibited from practising their profession and thus to a violation of the applicants' occupational freedom.

The rights of the applicants arising from the Postal Act remain protected. In particular the arrangement under section 4(3) sentence 5 PostG remains unaffected, according to which applicants are deemed to be registered no later than four weeks after having submitted a complete application, provided that the application has not been rejected within this period.

### 2.

Point 2 sentence 1 of this administrative order permits applicants to be contracted by or contract other providers to provide postal services. This arrangement provides potential contracting entities and contractors with at least temporary legal certainty. It also ensures that the authorisation re point 1 does not lose its meaning, because under section 4(1) sentence 3 PostG a provider may only commission another provider to provide postal services if the commissioned provider is in the provider register.

The arrangement in point 1 sentence 1 is suitable and necessary to protect applicants' occupational freedom, including for the duration of the application procedure. The unexpectedly large number of applications for entry in the provider register that have been received by the Bundesnetzagentur inevitably leads to a longer processing time. This leads to concerns that under the Postal Act currently in effect on the postal market, applicants are being denied the right to conclude contracts with other providers for the provision of or participation in postal services, as entry in the provider register is not permitted before the application procedure is completed.

This does not appear to violate the rights of third parties, in particular of those providers who have already been entered in the provider register or are provisionally authorised to provide postal services on the basis of a postal licence or a notification under the old PostG.

### 3.

Point 2 sentence 2 instructs the applicants to provide the Bundesnetzagentur with the name and address of their contracting entity or contractor if a contractual relationship with other providers exists. This ensures that registered providers can be informed by the Bundesnetzagentur in cases where their contractual partners are not listed in the provider register while maintaining the ability to meet their legal obligation under section 4(1) sentence 3 PostG.

The arrangement in point 2 sentence 2 is suitable and necessary to ensure that when applicants are not in the provider register the respective contracting parties still have the opportunity to learn of this fact and to comply with the provision of section 4(1) sentence 3 PostG. There does not appear to be a milder means than the order of this notification requirement. Otherwise the Bundesnetzagentur would not be able to know with whom applicants have concluded contracts in the meantime for the provision of postal services. As a result it would not be able to inform a contracting party concerned that the other contracting party is not in the provider register. Thus there would be a risk of providers being active on the postal market that, contrary to legal provisions and requirements, are not entered in the register.

The arrangement is also reasonable. With a negative outcome of the application procedure the applicant no longer has the right to provide services by means of contractual cooperation with others without having been added to the provider register. In this regard all applicants whose request for entry in the provider register could not be approved are treated the same.

The same applies to the rights of the applicants' contracting parties. They are allowed for the duration of the authorisation to conclude contracts with applicants in connection with the provision of postal services. The risk of having to terminate such contractual relationships because the applicant cannot be added to the provider register does not transcend the fact that it is prohibited to enter into contracts with these persons and companies for the purpose of providing postal services.

### 4.

Point 3 excludes the possibility that postal services may be provided provisionally by applicants whose application for the provider register was already previously denied. There does not appear to be a milder means of ensuring market access in a legally compliant manner, nor do there appear to be rights of third parties that could be violated by this order.

**5.**

Point 4 emphasises the provisional nature of the authorisation in points 1 and 2 and also makes clear that a withdrawal of the application nullifies the provisional authorisation granted by points 1 and 2 of this general administrative order. This arrangement is suitable and necessary to ensure that the temporary authorisation does not remain in effect permanently or have to be withdrawn separately. The order is also reasonable because there do not appear to be any rights of third parties that would be violated by it.

**6.**

Point 5 sets a time limit on the temporary order. Due to an unexpectedly high number of provider register applications the Bundesnetzagentur is currently unable to process the applications within a reasonable period of time. Persons and companies applying to be added to the provider register also did not yet have the opportunity to submit applications after the legal application requirement became known but before the arrangements entered into force. The Bundesnetzagentur currently expects the number of new applications that will be submitted after 30 September 2025 to have decreased to such an extent that there will no longer be delays in processing them. For this reason a temporary authorisation for the provision of postal services and all orders related to this general administrative order will no longer be necessary to be able to comply with the timely registering of applicants in the provider register.

### **III.**

The temporary order is issued as a general administrative order because it concerns a large number of similar matters. It would be unfeasible to issue individual temporary orders to each individual applicant. The general administrative order going into effect is urgent because until it becomes effective applicants are virtually prohibited from practising their profession. For this reason point 6 sets the day after publication in the Official Gazette pursuant to section 97 sentence 4 PostG in conjunction with section 41(4) sentence 4 VwVfG as the day of public notification.

## **Notification of appellate remedies**

An appeal against this administrative order may be lodged within one month of its issue. The appeal must be lodged with the Bundesnetzagentur, Tulpenfeld 4, 53113 Bonn or any other Bundesnetzagentur office. Under section 103(2) PostG objections and action against the decision above do not have suspensory effect.

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