



Brief 3

September 2016

Public Procurement

Contracting Authorities

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General definitions: contracting authority; body covered by public law

The Public Sector Directive (the Directive)¹ only applies if a body is a “contracting authority”. The term “contracting authority” is defined in the Directive. Where a body falls within the definition of a contracting authority, its procurement will then be subject to the Directive. If a body does not fall within the definition, its procurement will not be subject to the Directive. If a body does not fall within the definition but nevertheless tries to follow the rules, this behaviour does not mean that any breach of the Directive’s provisions it commits would be open to challenge. The Directive either applies or does not apply; there is no “in-between”.

Contracting authorities: The term “contracting authorities” covers:

- the state;
- regional and local authorities;
- bodies governed by public law;
- associations formed by one or more such authorities or one or more such bodies governed by public law.

The Directive also defines the terms “central government authorities” and “sub-central contracting authorities”. Central government authorities are only those contracting authorities that are listed in Annex I of the Directive, while “sub-central authorities” are all other contracting authorities covered by the Directive. This distinction is relevant because the Directive provides for the possibility of the application by sub-central authorities of more flexible procurement rules with regard to advertising and to the setting of time periods for receipt of tenders.

The term “the state” encompasses all of the bodies that exercise *legislative, executive and judicial* powers. The same applies to bodies, in a federal state, that exercise those powers at federal level. The definition of the state is broad, and the European Court of Justice (CJEU) has taken a particularly functional approach in deciding whether or not an organisation falls within the definition of a public authority. It thus examines more closely the actual function of the entity concerned rather than the formal categorisation that the entity has been given by domestic law.

What is a “body governed by public law”? This type of body does not have a simple definition; it depends on whether the body has certain characteristics. These characteristics are expressed as conditions that need to be met so that the body in question may be considered as a body governed by public law.

The main question centres around three *cumulative* conditions required by the Directive to indicate the existence of a body governed by public law. The CJEU has consistently held that a body must satisfy all three of these conditions in order to fall within the definition. These conditions, set out in Article 1(4) of the Directive, for qualifying as a body governed by public law are as follows:

- Condition 1: established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- Condition 2: having legal personality;
- Condition 3: financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more

¹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

What does Condition 1 mean? Condition 1 is not defined in the Directive, but the CJEU has examined this condition in particular and has addressed two separate but linked issues: 1) whether the organisation has been established to meet needs in the general interest; and 2) whether those general interest needs have an industrial or commercial character (in order to satisfy the definition, the general interest needs must *not* have an industrial or commercial character).

“Needs in the general interest” are *generally* needs that are satisfied otherwise than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or over which it wishes to exercise a decisive influence. The CJEU has tended to regard state requirements in terms of 1) the specific tasks to be achieved; 2) the explicit reservation of certain activities to the public authorities; 3) the obligation of the state to cover the costs associated with the activities in question; 4) the control of prices to be charged for the services; 5) the degree of monitoring or security required; and 6) the “public interest”.

The additional criterion for the purposes of this definition is that the general interest needs must not have an industrial or commercial character. These needs are generally activities that are carried out for profit in competitive markets. The Directive explains that a body that operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity, should not be considered as being a “body governed by public law”.

Examples of organisations that can be covered by this definition are 1) public-housing bodies; 2) an organisation established to produce, on an exclusive basis, official administrative documents; 3) a public limited company set up by two municipalities and entrusted with tasks in the field of waste collection and road cleaning; and 4) regional development agencies working to attract inward investment.

Joint purchasing and central purchasing

Significant benefits and savings can be obtained, in terms of both administrative resources and costs, if authorities aggregate their requirements and purchase jointly or through a central purchasing body. There is no provision in the Directive that prohibits a contracting authority from participating in joint purchasing. The Directive contains special provisions permitting the establishment and operation of central purchasing bodies.

- **Joint purchasing:** A number of contracting authorities may simply choose to aggregate their requirements and jointly conduct a contract award procedure. This form of joint purchasing could be carried out in the name of each of the contracting authorities or in the name of a single contracting authority acting on behalf of the others. To the extent that these contracting authorities simply act jointly, without the benefit of a special purpose vehicle or without nominating one of their number as agent for the others, they will be acting as an association of contracting authorities.
- **Central purchasing bodies:** The Directive permits the establishment of a specially created contracting authority with a central purchasing function in mind: a central purchasing body.

For the purposes of the Directive, a central purchasing body is a “contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities”. Centralised purchasing activities are activities performed on a permanent basis, in the form of the acquisition of supplies and/or services intended for contracting authorities or the award of public contracts or the conclusion of a framework agreement for works, supplies or services

intended for contracting authorities. Ancillary purchasing activities, in turn, are “activities consisting in the provision of support to purchasing activities”, such as providing technical infrastructure, advising on the conduct of procedures, or preparation and management of procurement procedures. The Directive provides that Member States may allow contracting authorities to acquire supplies and/or services from a central purchasing body offering centralised purchasing activities. Contracting authorities that acquire supplies or services from a central purchasing body offering centralised purchasing activities are deemed to have fulfilled their obligations stemming from the Directive.

For more discussions on centralised activities, please see SIGMA Public Procurement Brief 20, *Central Purchasing Bodies*.

Contracting entities in the utilities sector

To which entities does the Utilities Directive² apply? The Utilities Directive only applies where a contracting entity falls within the definition of a utility, as set out in the Utilities Directive. Whether a contracting entity falls within the definition of a utility to which the Utilities Directive applies is not linked to the private or public nature of a contracting entity. It is linked to two factors: the specified field of activity in which the contracting entity operates and the basis upon which the contracting entity carries out that activity.

It is also important to remember that, unlike the provisions in the Directive, entities falling within the definition of a utility covered by the Utilities Directive are covered *only* to the extent that they carry out a relevant activity defined in the Utilities Directive and for contracts of a defined type.

There are three types of defined contracting entity (jointly referred to as “contracting entities”) in the Utilities Directive:

- **Contracting authorities:** The definition of “contracting authority” in the Utilities Directive is the same as in the Directive. It covers the state, regional or local authorities, bodies governed by public law as well as associations formed by one or more such authorities or one or more bodies governed by public law. The Utilities Directive also provides a definition of regional and local authorities, but this definition is without legal consequences, as all contracting authorities are subject to the same procurement rules.
- **Public undertakings:** Public undertakings are defined in the Utilities Directive as any undertaking over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of the undertaking, their financial participation therein, or the rules that govern it.
- **Entities operating on the basis of special or exclusive rights:** The Utilities Directive also applies to entities that fall within a three-part definition. These are entities that:
 - are not public authorities or public undertakings;
 - have as one of their activities any of the relevant activities outlined below;
 - operate on the basis of “special or exclusive rights” granted by a competent authority of a Member State.

“Special or exclusive rights” are meant to be rights that have the effect of limiting the exercise of the “relevant activities” mentioned below to one or more entities and that substantially affect the ability of other entities to carry out such activities. The Utilities Directive explains

² Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

that if a right has been granted by means of a procedure in which adequate publicity has been ensured and objective criteria have been used is not a special or exclusive right in the meaning of the Utilities Directive.

What are the “relevant activities”? Contracting entities falling within the above definitions are covered by the Utilities Directive, but only to the extent that they carry out a “relevant activity” and only in relation to contracts awarded for the purpose of carrying out that activity. In summary, the relevant activities are the provision of or operation of networks for:

- water;
- energy – including electricity, gas or heat and the exploitation of a geographical area for the purposes of extracting oil or gas or of exploring for, or extracting, coal and other solid fuels;
- transport services – operation of transport networks and terminal facilities;
- postal services.

The Utilities Directive provides a mechanism for distinguishing between various situations where a contract covers a relevant or several relevant activities and a contract that covers a relevant activity or several relevant activities involving defence or security. The Directive also contains provisions dealing with mixed contracts, including contracts that potentially fall under more than one regime, for example the public sector and the utilities sector.

See SIGMA Procurement Brief 16, *Procurement by Utilities*, for further information.

What is the Article 34 exemption?

Under Article 34 of the Utilities Directive, the European Commission may grant an exemption from the provisions of the Utilities Directive to those contracting entities carrying out a relevant activity that, in the Member State in which it is performed, is directly exposed to competition in a market to which access is not restricted.

The test of whether markets are competitive necessarily takes account of both the legal and factual situations in the Member State concerned. The test is necessarily to be made on a case-by-case basis.

The exemption is granted by means of a Decision by the European Commission, which is prompted by an application by an EU Member State or by a contracting entity if allowed by the legal provisions of that Member State. See SIGMA Procurement Brief 16, *Procurement by Utilities*, for further information.

Further information

Publications

SIGMA (2015), *Public Procurement Training Manual* – Modules D1 and D2, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

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