



# **VIth IPA REGIONAL PUBLIC PROCUREMENT CONFERENCE**

## **UTILITIES: HOW THE EU DIRECTIVE IS IMPLEMENTED AND HOW IT WORKS IN EU MEMBER STATES**

**Elizabeth STAVRESKI**

**[elizabethstavreski@hotmail.com](mailto:elizabethstavreski@hotmail.com)**



# The Utilities Directive (2004/17)

applies to services, supplies or works procurements entered into by utilities (i.e. public and certain private bodies operating in the water, energy, transport and postal services sectors) that relate to a utility activity

# Basic Philosophy

- utilities operating on the basis of an exclusive licence is that they will enjoy statutory or near-statutory monopoly powers in their chosen area of utility activity and therefore need to be regulated in relation to any procurements which they undertake. Therefore it is not only public entities who are bound to follow EU rules with regard to procurement of goods, services and works but also the private bodies
- Where a market has been liberalised and opened up to competition, however, the view is that there is no longer a need to regulate the procurement activity of either public sector or private utilities.
- Recognising the more commercial nature of the market the directive is more flexible and generally less stringent, including higher thresholds, more options as to when and how to advertise contract opportunities, less control over the conduct of the selection and evaluation phases and use of more flexible purchasing tools.

# Public Utility Context

- In many EU member states the utilities sector is entrusted to government organisations which are public entities
- Wholly private (not public bodies)
- Mixed economy, both public and private entities operate in the market

# 3 Types of defined entity

- Contracting authorities (same as in Public sector directive)
- Public undertakings – any undertaking over which public authorities may exercise directly or indirectly a dominant influence by virtue of ownership or financial participation
- Entities operating on the basis of special or exclusive rights
  - Are not public authorities or public undertakings
  - Carry out a relevant activity
  - Operate on the basis of special or exclusive rights granted by a competent authority of a member state.

# Relevant activities

Water – activities concerned with the supply of drinking water, including hydraulic engineering, land drainage and sewerage treatment but not supply methods of bottled water.

Energy- including operation of a fixed network intended with the connection, production, transportation or distribution of electricity, gas, or heat as well as supply. Also includes exploration for the purpose of extracting oil, gas, coal.

Transport services – railway, automated systems, tramway, trolley bus, bus and cable networks, exploitation of a geographical area for airports, maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Postal services – clearance, sorting, routing and delivery of postal items as well as mailroom management and logistics services provided by a postal services utility entity.

\*\*\* when an entity carries out an activity which is not a 'relevant activity' the contracts are not subject to the Utility Directive

# Contracts Covered

- Works
- Supplies
- Services

Thresholds EUR 5 000 000 for works and EUR 400, 000 for supplies and services contracts and design contests.

# Procurement Procedures

- Open procedure
- Restricted procedure
- Negotiated procedure with a prior call for competition

Provisions for conduct of the procurement process are less detailed and prescriptive to that of the public sector. For example no exhaustive criteria for qualitative selection, time limit for receipt of tenders by mutual agreements.

General principles to ensure equal treatment, transparency and not to distort competition still apply



# Purchasing tools

- Qualification systems –economic operators interested in contracting with the utility apply to be registered as providers using predefined and published qualification criteria
- Framework agreements
- Electronic auctions
- Design contests
- Dynamic purchasing systems

# Exemptions

- Based on practical considerations relating to the supply or on the degree of competitions in these markets. e.g purchase of fuel for the production of energy, purchase of water for water services, bus transport services and upstream oil and gas exploitation
- Affiliated undertakings between mutually owned or dependent companies – treated as ‘in house’ contracts
- Purchases for resale or rehire
- Utilities directive does not apply to contracts in a country outside the EU

# The Article 30 exemption

- Article 30 of the Utilities Directive provides for a general exemption from the Utilities Directive to a utility activity in the Member State in which it is performed, provided that the specific activity "is directly exposed to competition on markets on which access is not restricted".
- This exemption is only available if the Commission has confirmed by way of a formal decision that the required competitive market conditions are met in that particular Member State.
- Common exemptions include the production and supply of electricity, oil and gas exploration and provision of express and courier services.

	Liberalised market and competition	Liberalised market Public operators dominant	Public monopoly	Liberalised market Private operators dominant	Private monopoly
Water	Estonia	Austria Bulgaria Germany Denmark Hungary Italy Poland Romania Sweden Slovenia	Belgium Cyprus Czech Republic Finland Greece Ireland Lithuania Luxembourg Latvia Malta Netherlands Portugal	France	Spain Slovakia UK
Energy	Austria Germany Finland Luxembourg Netherlands Sweden UK	Belgium Estonia France Hungary Ireland Italy Lithuania Poland Romania Slovenia	Cyprus Czech Republic Malta Slovakia	Bulgaria Denmark Spain Greece Portugal	

	Liberalised market and competition	Liberalised market Public operators dominant	Public monopoly	Liberalised market Private operators dominant	Private monopoly
Transport	Czech Republic Finland Lithuania Malta Portugal Sweden Slovakia UK	Belgium Bulgaria Denmark Estonia France Hungary Ireland Italy Luxembourg Slovenia Latvia Netherlands Poland Romania	Austria Cyprus Germany Spain Greece Portugal		
Postal Services	Lithuania Luxembourg Netherlands	Belgium Bulgaria Czech Republic Estonia Spain Greece Hungary Ireland Italy Latvia Portugal Romania Sweden Slovenia Slovakia UK	Cyprus Germany Denmark Finland France Poland		Malta

# Postal Services

- Postal services recently liberalised and closely being monitored to make sure the benefits of market opening, including legitimate public-interest objectives, are not frustrated by anticompetitive practices on the part of governments and companies.
- the new framework for the Services of General Economic Interest – SGEI, for short – that came into effect on January 31st allows the Commission to promote more actively efficiency and quality in certain public services, including postal services, and to strengthen competition in the industry.
- In January the Commission rejected the proposed take-over of TNT Express by UPS. The planned deal, among other things, would reduce from four to three the number of companies that control pan-European parcel-transport networks.
- Many European companies use parcel express delivery services as part of their logistic chains, notably for cross-border shipments. Therefore, it is important that the prices of these services remain constrained by vigorous competition.

# Energy

- The energy market has made considerable progress in recent years of true competition and electricity imported and exported throughout though largely limited to Western Europe.
- Most national electricity grids and power generators are state controlled
- Cross border trading of gas and electricity is now common place in countries such as Germany, Sweden, France, Italy, Switzerland, Norway, the Netherlands, UK, Spain
- Real competition in energy markets in Central and Eastern Europe is not yet a reality.
- The move to a common electricity market and move to super grid across the EU is a key priority.

- Regulation highly complex and no two countries the same
- Regulators becoming increasingly demanding in addressing consumer concerns and rising prices
- Utility companies see significant opportunities
  - Rising energy demand in emerging markets
  - Aquisitions or alliances to gain new capabilities
  - Growth in energy and ancillary services markets
- Risks include political interference and market volatility.
- Rise of Framework Agreements and performance contracting where the utility makes the capital investment and then is paid in terms of savings delivered from their investment e.g installing energy saving street lights
- Increasing globalisation of capital investment diminishing relevance of nationality in respect of utility ownership  
In UK 40% of infrastructure in assets across energy, water, transport and communication owned by foreign investors.