

## **PUBLIC PROCUREMENT REFORM**

### **FACT SHEET No 11: NEW RULES FOR THE UTILITIES SECTORS**

As in the past, the 'utilities sectors' are covered by separate and more flexible rules, which will apply not only to traditional public purchasers (the state, municipalities, regions, etc.), but also to public or private companies.

- **Sectors concerned**

**Water, energy, transport and postal services**

However, activities related to **oil and natural gas exploration**, as well as certain **services related to postal services** (financial, logistic, electronic and stamping services), will now be excluded.

- **Revision** of the rules for utilities sectors is generally **modelled on that of public procurement**, with such **adjustments** as are needed to safeguard the option of more flexible practices appropriate to entities engaged in commercial or industrial activity. In particular:
  - provisions relating to conflicts of interests will apply only to public purchasers, and not to public or private companies (see FACT SHEET No 10);
  - purchasers will remain free to choose either to award several contracts to various small businesses or to award a single contract to one large company (the Directive does not incline towards one option or the other) (see FACT SHEET No 2);
  - the obligation to exclude companies in certain cases will apply to public purchasers only (see FACT SHEETS No 7, 8 and 10);
  - the threshold for application of the new simplified arrangements for social, cultural and health services and some other services is EUR 1 000 000, taking into account the higher thresholds applicable to the utilities sectors (see FACT SHEETS Nos 6 and 8).

The following rules for the utilities sectors under Directive 2004/17/EC remain **unchanged** in substance:

- the rules concerning use of negotiated procedures;
  - the concepts of 'public undertaking' and 'affiliate company';
  - the provisions applicable to tenders from third countries.
- The rules apply to **purchases of supplies, services and work** from operators in these sectors when such purchases are made to **provide the relevant service**. For example, the Directive covers:
    - contracts to be entered into by the energy supplier (the operator concerned) for infrastructure maintenance or building a power plant;
    - purchases of cars for staff maintaining the water distribution network;

- purchases of buses or computers for the offices of a transport service manager.

A case by case analysis is needed to determine the rules applicable to the purchase by others of services offered by operators of services covered by the Directive, as different scenarios are possible. Thus, for example:

- a ministry purchasing bus transport services for its own employees must abide by the rules of the traditional 'public procurement' Directive;
  - a railway company purchasing electricity will be subject to the rules of the 'utilities sectors' Directive, while
  - the award of a concession to manage an airport must comply with the new provisions of the 'concessions' Directive.
- The concept of **'exclusive and special rights'** is specified:
    - unlike the 'public procurement' Directive, the 'utilities sectors' Directive also applies to contracts awarded by public undertakings (on which public purchasers have a dominant influence), and to those awarded by **private entities** which have obtained the **exclusive or special right** to operate in one of the sectors concerned;
    - however, when the exclusive or special rights have been granted on the basis of a **transparent procedure (for competition or licensing on request) based on objective criteria**, the private operator concerned is then exempted from applying EU rules when awarding contracts;
    - EU legislation/procedures meeting these conditions of transparency and objectivity are **listed explicitly**.
  - The **exemption procedure**
    - Under the current rules ('Article 30 procedure' of Directive 2004/17/EC), a Member State may ask the Commission to exempt a particular sector from application of the Directive. For this to be done, **access to this sector** must be completely free and the sector must be directly **open to competition**. These 2 **conditions are maintained**.
    - The new rules **improve** the exemption procedure in itself, particularly with regard to deadlines.
  - **Framework agreements**
    - These are general agreements that cover a series of orders or individual services in varying degrees of detail.
    - The new rules aim to **increase transparency** in the procedures for the conclusion of such agreements. Thus:
      - with a few exceptions, the **maximum duration** of a framework agreement will be **8 years**;

- the criteria for awarding contracts on the basis of a framework agreement must be **objective** and **transparent**.