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Public utilities from the perspective of EU's procurement directives

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Legal and policy framework

- EU Treaty: equal treatment, market access, transparency
- Directives: 'classical', utilities; remedies
- Rulings by the Court of Justice of the EU
- Access to public services; user rights
- Quality and environment
- Subsidiarity: increased competences of local authorities; citizen mobilisation et participation





Utilities Directive: Scope I

- Regulates the award of contracts only in certain sectors:
 - Energy (electricity, gas, heat, exploration and extraction of oil, natural gas, coal and other solid fuels)
 - Water
 - Transport (urban transport: bus, metro, tram, etc.)
 - Postal services
 - Transport terminal facilities (ports, airports)





Utilities Directive: Scope II

- But it covers only certain activities, which are related to
 - the provision and operation of fixed networks: water, electricity; urban transport (not telecoms!)
 - supply of energy, water etc. to such fixed networks
 - postal services; exploration/extraction of fuels; provision of terminal facilities (airports, sea ports)





Contracting entities covered

- **Contracting authorities**
- **Public undertakings** (over which contracting authorities can exercise direct/indirect dominant influence)
- **Other entities which operate on the basis of special or exclusive rights** granted by a competent authority
(legislative/administrative/regulatory provisions that limit the exercise of activities)





Thresholds

- The Directive applies to contracts over the thresholds
 - Works: EUR 5 000 000
 - Supplies, services: EUR 400 000
(higher than for 'classical' procurement!)

See http://ec.europa.eu/internal_market/publicprocurement/rules/current/ement/rules/current/



Scope (Conclusion)

The Directive applies to contracts which are awarded

- by an entity covered,
 - which exercises an activity covered,
- and to the extent that
- the contract is awarded for the purposes of such activity





Specific features I

- More flexible rules in some areas:
 - Free choice of negotiated procedure with prior call for competition
 - Shorter time limits
 - Periodic indicative notice, qualification system
 - Less detailed rules for the selection of participants
 - More exceptions: purposes of resale, contracts awarded to affiliated undertakings, etc.





Specific features II

- Possibility to be exempted from the directive
 - If the activity is directly exposed to competition in the given Member State
 - Based on the formal decision of the European Commission





Coming changes: intentions

- Emphasis on efficient public spending
- Easier for SMEs to participate
- Greater possibility to promote social goals
- Better legal certainty; case-law reflected
- Greater flexibility for contracting entities
- Design may be included in works, or not
- Innovation to be encouraged & facilitated
- Framework agreements more flexible
- Oil & gas exploration now excluded
- Dynamic purchasing systems simplified





Typology of EU Member States

- Northern Europe: strong municipal enterprises; increasing private participation; mobilisation of citizens
- UK: regional private firms provide, independent sectoral agencies regulate
- Germany: intermunicipal cooperation; mix of private and public sector providers;
- South and East Europe: de- and re-centralisation, entry of private firms; institutions being developed





Differences between sectors

- Electricity: decoupling production-transmission-distribution; subsidies for alternative sources; privatisation
- Water, waste water: integrated systems; attention to water quality
- Locaux public transport: mix of service providers; tariff integration; often important subsidies



Some observations

- No clear, systematic difference between private and public sector providers
- Resources and know-how of municipalities largely determine the outcome
- Importance of clear, reasonable service requirements, good quality control, and competent management



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