



Support for Improvement in Governance and Management

A joint initiative of the OECD and the EU, principally financed by the EU

Brief 3

January 2011

Public Procurement

What is a Contracting Authority?

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The Public Sector Directives only apply if a body is a “contracting authority”. The term “contracting authority” is defined in Directive 2004/18/EC (‘the Directive’). Where a body falls within the definition of a contracting authority then its procurement will be subject to the Directives. If a body does not fall within the definition then its procurement will not be subject to the Directives. If the body does not fall within the definition but it nevertheless tries to follow the rules, this does not mean that any breach of the Directive’s provisions that it commits would be open to challenge. The Directive either applies or does not apply; there is no ‘in-between’.

There are two main categories of contracting authority, as defined in Directive, namely:

- public authorities
- bodies governed by public law

What is a public “authority”?: Public authorities are defined in the Directive as ‘state, regional or local authorities’. This definition covers not only the executive authority of the state, but all state entities i.e. state administrations and regional or local authorities. The term ‘the state’ also encompasses all of the bodies that exercise *legislative*, *executive* and *judicial* powers. The same applies to bodies that, in a federal state, exercise those powers at federal level.

The definition of the state is broad and the European Court of Justice (ECJ) has taken a particularly functional approach in deciding whether or not an organisation falls within the definition of a public authority. It thus looks more at the actual function of the entity concerned than at the formal categorisation that the entity has been given by domestic law.

Contracting authorities may also be made up of associations formed by one or several of such authorities or by one or several bodies governed by public law.

What is a ‘body governed by public law’?: This does not have a simple definition; it depends rather on whether it has certain characteristics. These characteristics are expressed as conditions that need to be met in order for the body in question to 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 ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition. These conditions, set out in article 1(9) of the Directive, are that a body governed by public law is a body:

- Condition 1: established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- Condition 2: having legal personality, and
- 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 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?: This is not defined in the Directive but the ECJ has looked at this condition in particular and has addressed two separate but linked issues: (1) whether the organisation is 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 retain a decisive influence. The ECJ has tended to look towards state requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation of the state to cover the costs associated with the activities in question; the control of prices to be charged for the services; the degree of monitoring or security required; and the ‘public interest’.

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities that are carried out for profit in competitive markets.

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

Annex III of the Directive includes a list of entities in each EU Member State that are considered to fall within the definition of ‘body governed by public law’. The lists are intended to be as comprehensive as possible but they are not exhaustive. Even if a body is not listed, it will nonetheless be covered if it meets all of the three conditions.

Can a contracting authority participate in joint purchasing or central purchasing?

There can be significant benefits and savings in terms of both administrative resources and cost in authorities aggregating their requirements and purchasing jointly or through a central purchasing body. There is nothing in the Directive prohibiting 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 done 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 established 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” that “acquires supplies and/or services intended for contracting entities” or “awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities”. The Directive also provides that “Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body”, and that contracting authorities purchasing works, supplies or services from or through a central purchasing body are deemed to have complied with the Directive insofar as the central purchasing body has complied with it.

Contracting entities in the utilities sector

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

It is also important to remember that, unlike in the case of the Public Sector 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 entity:

- **Contracting ‘authorities’:** The definition of ‘contracting *authority*’ is the same as in the Public Sector Directive. There are two main types of contracting authority, and the case law on this issue has resulted in a flexible definition. The two types are: ‘public authorities’ and ‘bodies governed by public law’.
- **Public undertakings:** Public undertakings are defined in the Utilities Directive as any undertaking over which public 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 which:
 - are not public authorities or public undertakings; and
 - have as *one* of their activities any of the relevant activities outlined below and
 - that operate on the basis of “special or exclusive rights” granted by a competent authority of a member state.

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 exploring for and extracting oil, gas, coal and other solid fuels.
- Transport services - the operation of transport networks and terminal facilities
- Postal services

The Utilities Directive provides a mechanism for distinguishing between various situations where a contract covers several relevant activities, activities covered by both the Utilities Directive and the Public Sector Directive or relevant activities as well as activities not covered by the Utilities Directive.

What is the Article 30 exemption?

Under Article 30 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 and 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 in question and necessarily is to be addressed 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, a contracting entity, or the Commission itself on its own initiative. The procedure of article 30 is supplemented by Decision 2005/15 ('the Decision'), which covers, among other issues, publication requirements, extensions, and procedures for forwarding decisions.

Further reading:

[SIGMA Public Procurement Training Manual](#)