

EXPLANATORY NOTE – UTILITIES DIRECTIVE

CONTRACTS INVOLVING MORE THAN ONE ACTIVITY¹

1. WHICH CASES DOES THIS REFER TO?

1. Article 9 and recital 29 of the new Utilities Directive (Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors²), unlike Directive 93/38/EEC, contain explicit provisions concerning the treatment of contracts intended for the pursuit of more than one activity referred to in the Directive.
2. Such situations may occur in a number of circumstances, depending on the activities for the pursuit of which the contract is intended, namely:
 - (a) pursuit of activities which are all subject to the provisions of the new Utilities Directive;
 - (b) pursuit of an activity subject to the new Utilities Directive and of another subject to the new "classic" Directive, Directive 2004/.../EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts;
 - (c) pursuit of an activity subject to the new Utilities Directive and of another activity which is not (or is no longer) subject either to that Directive or to the new "classic" Directive;
 - (d) or even – to complete the theoretical framework – pursuit of activities which are all subject to the new classic Directive.

It is appropriate from the outset to eliminate cases appearing under (d), given that they are not governed by the provisions of the new Utilities Directive and the new classic Directive does not contain similar provisions. However, the first three categories merit examination in greater detail.

1.1 All activities are subject to the new Utilities Directive

3. Where a contract is awarded for the pursuit of two or more activities all of which are subject to the provisions of the new Utilities Directive (point (a) above), Article 9 rarely enters into play. However, there are particular cases where

¹ This Document corresponds to document CC/2004/34 of 18.6.2004

² OJ L 134 of 30.4.2004, p. 1.

specific rules apply exclusively to certain of the activities referred to in the Directive. This is true of the special regime provided for in Article 27 for entities operating in the hydrocarbons and/or coal sectors in the Netherlands, the United Kingdom, Austria and Germany. If, for example, an Austrian contracting entity awards a contract for the purpose of both petroleum extraction and coal extraction, the rules of Article 9 determine whether the contract in question should be awarded in accordance with the standard rules of the Directive or whether the special regime under Article 27 will be applicable to this mixed contract.

1.2 Certain activities covered by the classic Directive, others by the Utilities Directive

4. Point (b) above relates to certain cases of contracts awarded by contracting authorities which are at the same time contracting entities, for example a municipality which, in addition to the normal activities of a local authority, directly manages by means of its own staff an activity referred to in the Utilities Directive such as the supply of drinking water or the management of bus transport lines etc. In such cases, if the contracting authority awards a contract the object of which is to satisfy requirements relating both to its "normal" activities and to its "sectoral" activities, then the rules applicable – the new classic Directive or the new Utilities Directive – must be determined in accordance with the provisions of Article 9.

1.3 An activity subject to the new Utilities Directive and one which is not subject to the public procurement rules

5. It may happen that contracting entities carry on more than one of the activities referred to in the Utilities Directive. The presence of provisions excluding or permitting the exclusion of certain activities from the scope may result in contracting entities awarding contracts intended to permit both the pursuit of activities subject to the Utilities Directive and the pursuit of activities which are not subject to it (see point (c) above). Going beyond the examples which may be drawn from the exemption of certain activities under Article 30, other cases might arise such as, for example, contracts awarded by an entity which also manages a bus transport service, excluded by virtue of Article 5(2), and a tram transport service, which would not have been exempted under Article 30. Another example might be that of a steelworks³ which supplies the networks with both heat and electricity under circumstances where the heat portion would be excluded by virtue of the provisions of Article 3(2) while the conditions to exempt the electricity portion on the basis of Article 3(4) would not be fulfilled. In this case too, Article 9 determines the regime applicable to mixed contracts.

2. WHICH LEGAL REGIME WILL APPLY TO MIXED CONTRACTS?

³ Provided that it is a public undertaking or, if it is a private undertaking, that it enjoys special or exclusive rights within the meaning of the new Utilities Directive in respect of its "electrical" activities.

2.1 The principal activity can be established – Article 9(1)

6. According to Article 9(1) of the new Utilities Directive, the principal rule is that a contract intended for the pursuit of more than one activity should be subject to the rules applicable to the activity for which it is principally intended.

Before launching a contract, contracting entities normally carry out an analysis of the needs to which the contract in question must respond in order to be able to establish the specifications and estimate the value of the contract to determine whether the threshold for the application of the public procurement rules has been reached. Thus a contract for the supply of paper presupposes that the contracting entity has information available to it enabling it to determine the quantities it requires, which also implies an estimate of the quantities necessary for the various users (such as the different services of the contracting entity). Similarly, in order to be able to award a contract for the purchase of photocopiers, the contracting entity must have an idea of the number and capacity of the machines – which most often implies that it has an estimate of the distribution of requirements among its services. Such analyses or estimates of requirements to be satisfied will make it possible to determine the activity for which the contract is principally intended.

7. Depending on the cases in question (see point 2 above), the first indent of paragraph 1 may mean that the contract in question will have to be awarded in accordance with the rules of the new classic Directive, those of the new Utilities Directive or even without applying detailed rules on public contracts⁴.

The starting point is that the application of the provisions of the first indent does not take account of the rules which would have been applicable to the contract or contracts in question if the contracting entity, instead of awarding a single contract, had awarded separate contracts each intended to cover requirements relating to the pursuit of a single activity. This choice may legitimately be based on reasons both of a technical nature and of an economic nature. Thus, in constructing a building intended to house the administration of two different activities, it would be very impracticable, if not impossible, to award separate contracts for the construction of those parts of the building intended for each of the activities, and the Public Procurement Directives could not impose the choice of housing the two administrations in separate buildings. Even in the absence of any technical reasons imposing the award of a single contract, economic reasons may also justify that choice: thus, if a building houses both services belonging to a "traditional" municipal administration and the bus transport administration managed by the same municipality, a single contract for cleaning the whole building is of course legitimate, even if the greater part of the premises (and hence of the cleaning requirements) belongs to the services which manage bus transport. If one entity manages both water supply and electricity distribution it would also be legitimate to award a single contract for the supply of fuel for its vehicles,

⁴ Subject of course to the rules and principles of the Treaty.

whatever the distribution of vehicles between these activities, and even if a possible exemption under Article 30 for one of the activities would mean that the application of the provisions of the first indent of Article 9 would exclude the specific contract from the application of the detailed rules of the new Utilities Directive.

8. It is, however, clear that in certain cases the application of the provisions of the first indent of paragraph 1 might be invoked to evade illicitly the application of Community rules. In order to avoid such behaviour, the second indent provides that the choice of the contracting entity may not be made "with the objective" of removing the contract or contracts in question from the scope of the Directives on public contracts. This clause is aimed at cases where it is clear that the choice of the contracting entity is not justified by technical or economic reasons but solely by the desire to have the contract evade the public procurement rules.

2.2 The principal activity cannot be established – Article 9(2) and (3)

9. It may be the case that the contracting entity is not in a position to determine the activity for which the contract is principally intended – either because the contract is intended for each of the activities in equal measure or because it does not have data permitting it to estimate the distribution of requirements. Such difficulties might arise in particular where the contract relates to a single piece of equipment (for example a telephone switchboard, a printing machine etc) and the contracting entity does not have information enabling it to estimate the utilisation rate attributable to the various activities carried on. In such cases, the regime applicable to the contract in question is determined by the rules in Article 9(2) and (3).
10. In the case of contracts intended for activities subject respectively to the new classic Directive and the new Utilities Directive⁵, the effect of the provisions of paragraph 2 is that the contract is subject to the provisions of the new classic Directive unless it is possible to determine the activity for which the contract is principally intended and that that is an activity referred to in the new Utilities Directive.
11. Similarly, the application of paragraph 3 – that is the rules applicable where it is not possible to determine whether a specific contract is principally intended for an activity which is subject to the new Utilities Directive or another activity not subject to the public procurement rules⁶ – means that the contract in question must be awarded in accordance with the rules of the new Utilities Directive.

⁵ See the explanations and examples in point 4 above.

⁶ See the explanations and examples in point 5 above. The reference to the new classic Directive which appears in paragraph 3 ensures that there will be no dual use between the provisions of paragraphs 2 and 3.

This provision, as well as paragraph 2, is based by analogy on the Judgment of 5 December 1989 which the Court of Justice gave in Case C-3/88, Commission of the European Communities v. Italian Republic, "Data processing"⁷. In this Judgment the Court took account of the fact that activities relating to the design and operation of a data processing service were interdependent with the acquisition of the necessary equipment for the realisation of that service when convicting for failure to comply with the Supplies Directive⁸.

⁷ European Court Reports 1989, p. 4035, points 18 and 19.

⁸ Council Directive 77/62/EEC of 21 December 1976.